Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

JOHN M. HEGARTY, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF KATHERINE A. HEGARTY,
Petitioner,

v.

GARY WRIGHT, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the First Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *Johnson v. Jones*, ___ U.S. ____, 115 S. Ct. 2151, 132 L. Ed. 2d 238 (1995) this Court held that police officer defendants in civil rights cases may not immediately appeal the denial of a motion for summary judgment on grounds of qualified immunity where the decision of the trial court was that there were genuine issues of material fact as to the defendants' conduct.

The questions presented are:

1. Whether the rule stated in *Johnson* applies to a case which was pending in the Court of Appeals when *Johnson* was decided;

2. Whether the appeal of the police officer defendants should have been denied on the basis that, considering the disputed facts in the light most favorable to plaintiff, there were genuine issues of material fact as to whether the defendants were entitled to qualified immunity.

LIST OF PARTIES

Pursuant to Rule 14.1(b) of the Supreme Court Rules, the parties to the proceedings below whose judgment is sought to be reviewed are:

John M. Hegarty, as Personal Representative of the Estate of Katherine A. Hegarty, and Individually

Petitioner

State Trooper Gary Wright
Sergeant Wilfred Hines
Deputy Rene Guay
Reserve Deputy Thomas Giroux, Jr.
William Crawford, Jr.
Spencer Havey, Sheriff, Somerset County

Respondents

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PETITION FOR A WRIT OF CERTIORARI

The petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit entered in the above-entitled proceeding on May 17, 1995, and the order of the First Circuit Court on the petition and supplemental petition for rehearing entered on July 20, 1995.

OPINIONS BELOW

The opinion of the Court of Appeals for the First Circuit is reported at 53 F.3d 1367 (1st Cir. 1995). A copy is reproduced as Appendix B. The order of court denying the petition and supplemental petition for rehearing is unreported. A copy is reproduced as Appendix A.

The order and memorandum of decision of the United States District Court for the District of Maine is reported at 848 F. Supp. 257 (D. Me. 1994), and a copy is reproduced as Appendix C.

JURISDICTION

The judgment of the Court of Appeals for the First Circuit was entered on May 17, 1995. On July 20, 1995, the Court of Appeals denied petitioner's Petition for Rehearing and Rehearing *in Banc* and Supplemental Petition for Rehearing and Rehearing *in Banc*. On July 27, 1995, petitioner moved for a stay of mandate which was denied on August 11, 1995.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions involved in this litigation are the Fourth Amendment to the Constitution of the United States, 42 U.S.C. § 1983, and 28 U.S.C. § 1291.

Fourth Amendment

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

28 U.S.C. § 1291

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the

District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

STATEMENT OF THE CASE

A. Introduction.

At midnight on May 15, 1992, while standing alone inside her remote cabin in northern Maine, Katherine Hegarty was shot to death by three police officers. Two of the officers had just broken through her locked front door while the other shot her through a window. No more than 12 minutes had elapsed from the time the officers arrived at the cabin to the moment Mrs. Hegarty was shot to death. The incident which triggered this tragic event was an argument over four hours earlier between Katherine Hegarty and four male campers who had dismantled her gate, trespassed on her property, set up camp very near the Hegarty cabin, and built an illegal fire.

As a result of Mrs. Hegarty's death, her husband sued the five officers who had been at her cabin, their supervisors and their employer, under the federal and Maine civil rights laws and for trespass and wrongful death. Joint Appendix (J.A.)[1] 34-38 (Complaint).

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[1]This is a citation to the Joint Appendix filed with the First Circuit Court of Appeals.

Jurisdiction of the United States District Court for the District of Maine was invoked under 42 U.S.C. §§ 1983 and 1988 and 28 U.S.C. § 1331 (federal question) and 1343 (civil rights). The District Court had pendent jurisdiction of the plaintiff's state law claims.

B. Facts.[2]

The police officers were looking for Mrs. Hegarty that evening as a result of a complaint by four male campers that Mrs. Hegarty had shot over their heads earlier, when they had illegally set up their camp and started a fire on her land. None of the campers was injured, nor was any of their equipment damaged, and an investigating officer concluded that a single mark near the bow of their boat had not resulted from a gun shot. When interviewed by the police, the campers did not say they were, nor did they appear to be, frightened that Mrs. Hegarty would come after them. J.A. 76 (Giroux Dep.). She had followed them out to the gate on her road but no further. J.A. 1203 (Legere Handwritten Statement). The defendant officers assumed or believed that it was Mrs. Hegarty who had done the shooting. J.A. 82 (Giroux Dep.), 130 (Crawford Dep.), 296 (Wright Dep.). They further concluded that she had not intended to hit the campers because she had a reputation as an expert shot and could have hit them if she had really wanted to. J.A. 815 (Plaintiff's Statement of Material Facts as to Which There Remains a Genuine Issue to Be Tried (Pl.'s St.)).

After talking briefly to the campers, the five defendants decided to go to Hegarty's cabin to arrest her, although they

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[2]The facts are presented here in the light most favorable to plaintiff, the non-moving party. *E.g.*, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S. Ct. 2505, 2513, 91 L. Ed 2d 202 (1986).

never had any real plan of action. *E.g.* J.A. 1061 (Giroux Statement to Lynch (Giroux St.)), 1100-01 (Guay Statement to Pulire (Guay St.)). There was never any discussion of obtaining a warrant. J.A. 84-86 (Giroux Dep.). The officers were simply to approach the cabin armed and were not to tell the decedent why they were there. A few of them would then forcibly enter her cabin while the others covered them. J.A. 84, 89 (Giroux Dep.), 132, 140 (Crawford Dep.), 251 (Guay Dep.), 819 (Wright Dep.). The defendants did not discuss or consider trying to wait her out or cordoning off the cabin or bringing in a trained tactical team. J.A. 819 (Wright Dep.).

A highly controverted issue in this case was whether Mrs. Hegarty was mentally imbalanced or irrational that day and whether she had a history of mental problems. The Court of Appeals justified the officers' decision to break into the Hegarty cabin in part on the basis of the "violent, irrational and unpredictable behavior recently exhibited by their barricaded suspect, including her bouts of laughter, history of emotional instability and demonstrated antagonism toward law enforcement personnel." App. B at 26, 53 F.3d at 1378-79.

These findings are unsupported by the evidence which showed Katherine's "history of emotional instability" to be attributable to one isolated occurrence several years earlier. The officers' knowledge of this occurrence was based solely on hearsay and rumor. J.A. 820 (Pl.'s St.).

At the cabin, the officers continued to be disorganized such that most of them did not know where the others were. *E.g.* J.A. 1068 (Giroux St.), 1176 (Wright Statement to Densmore). When they arrived just before midnight, they could see Mrs. Hegarty's truck sitting in front of the cabin and could hear loud music from the radio but saw no lights on in the cabin.

J.A. 90 (Giroux Dep.), 141 (Crawford Dep.), 822 (Pl.'s St.). The officers moved about at will, calling to Hegarty but getting no response.

Less than three minutes before she was killed, Katherine Hegarty was awakened by Sergeant Crawford illuminating her bedroom with a flashlight shining through her window. Still in bed, she reached for a long rifle, but did not shoot. Katherine Hegarty immediately turned the radio down so low that it could not be heard, or turned it off; only then did Sergeant Crawford identify himself. J.A. 144-45 (Crawford Dep.), 823 (Pl.'s St. ¶¶ 28, 29).

Katherine Hegarty then walked into her front room of her cabin unarmed. She kneeled on her couch, within inches of the cabin's front window. In response to the officers' assertions that they wished to help her, she asked them to leave. She was then falsely told that the officers were investigating burglaries in the area, and that the officers believed that she could help; she told them that there had been men around but that she could not describe them. During this dialogue, she continued to decline the officers' offers of help, and repeatedly asked them to leave her property. J.A. 92 (Giroux Dep.), 211 (Hines Dep.), 256 (Guay Dep.), 823-24 (Pl.'s St.).

As Katherine Hegarty kneeled by the front window, Officer Guay was within inches of her, so close that, had she been in the aggressive state the officers assumed, she could easily have shot him. With his flashlight, he was able to observe her hands and the area immediately around her. She was unarmed, made no threat, and no officer believed that she posed any immediate danger. She was never told that she was under arrest, or that the officers were present to investigate a criminal complaint against her. J.A. 95 (Giroux Dep.), 145,

148 (Crawford Dep.), 213-15 (Hines Dep.), 256-57 (Guay Dep.), 824-825 (Pl.'s St.).

Suddenly, without any warning whatsoever, one officer covered by two others began to kick in Katherine Hegarty's locked front door. After the second kick, Katherine Hegarty retreated further into her living room, picking up a rifle on the way. Almost simultaneously, the door burst open and two men entered, pointing guns at her. At that point one of the officers outside was shining his flashlight into Mrs. Hegarty's face. J.A. 1109 (Guay St.). When Katherine Hegarty did not immediately drop the rifle on demand, she was shot to death at point-blank range by the three officers. Between the officers' arrival at her isolated cabin and their kicking in her door, only 9 to 12 minutes passed. J.A. 94, 97 (Giroux Dep.), 152 (Crawford Dep.), 215-17 (Hines Dep.), 825-826 (Pl.'s St.), 1013 (A.G.'s Resp. to Shooting).

C. Procedure.

Based on depositions, answers to interrogatories, affidavits, and other evidence, the individual police officers moved for summary judgment arguing that they were entitled to qualified immunity. Their motion was denied by the District Court which stated that, "[b]ased on the facts viewed in the light most favorable to Plaintiff, the officers could not reasonably have believed that their forcible intrusion into Hegarty's home was justified by exigent circumstances." App. C at 43, 848 F. Supp. at 264. The District Court reasoned as follows:

> Exigent circumstances did not exist in this case nor was it reasonable for the officers involved to believe that such circumstances existed. There was no hot pursuit of a fleeing

> felon. In fact, when the officers first arrived on the scene, Hegarty appears to have been sleeping. There was virtually no likelihood that Hegarty would escape if not swiftly apprehended. Just before the officers began the forcible entry, Hegarty was kneeling on her couch within the sight of the officers and speaking with the officers. There was no risk of destruction of any evidence.
>
> The officers assert that they knew Hegarty was armed and therefore feared that Hegarty would injure them or herself. The Court is not persuaded, however, that such fears were reasonable under these facts. In fact, several officers have stated that, just prior to the entry, Hegarty posed no immediate danger to themselves or anyone else. J.A. 257 (Guay Dep. 124), 95 (Giroux Dep. 96-97). Hegarty repeatedly asked the officers to leave, but she neither threatened them nor did she fire any shots while the officers were present. In fact, the officers decided to enter Hegarty's home forcibly only after it appeared that she had put down her rifle. Hegarty did not threaten injury to herself at any time, nor were there other individuals in danger.

App. C at 42, 848 F. Supp. at 264. In reaching its conclusion, the District Court construed the record in the light most favorable to the plaintiff. App. C at 34, 848 F. Supp. at 261.

Under *Mitchell v. Forsyth*, 472 U.S. 511, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985), the officers immediately appealed the District Court's denial of their motion for summary

judgment to the Court of Appeals for the First Circuit. That court overturned the District Court's decision on the same facts:

> We therefore conclude that a competent police officer — possessing the same information the defendant officers had on May 15, 1992 — reasonably could have believed both that there existed probable cause to arrest Katherine Hegarty and exigent circumstances justifying their immediate warrantless entry.

App. B at 27, 53 F.3d at 1379. Like the District Court, the Court of Appeals more than once stated that it was reviewing the facts in the light most favorable to the plaintiff. *See id.* at 5 n. 1, 11, 53 F.3d at 1370 n. 1, 1372. Unlike the District Court, however, it did not in fact do so.

The Court of Appeals' judgment was issued on May 17, 1995 and entered on the docket on May 18, 1995. On June 7, 1995, petitioner filed a petition for rehearing and rehearing in banc, the thrust of which was that the Court of Appeals had failed to consider the record in the light most favorable to plaintiff. On June 12, 1995, this Court decided *Johnson v. Jones*, ___ U.S. ____, 115 S. Ct. 2151, 132 L. Ed. 2d 238 (1995) in which it held that a police officer may not always immediately appeal when a court denies his motion for summary judgment based on qualified immunity. If the basis of the denial is that there are genuine issues of material fact precluding the entry of summary judgment, then the defendant may not take an interlocutory appeal. *Id.* at 2157-58. Since petitioner's case was still pending before the Court of Appeals on petition for rehearing, and because *Johnson* specifically precludes the defendants in this case from immediately appealing the denial of their motion for summary judgment, plaintiff filed a

supplemental petition for rehearing and rehearing in banc raising that issue. Both of plaintiff's petitions were denied by order of the Appeals Court dated July 20, 1995. App. A at 1. On July 27, 1995, petitioner moved to stay the mandate pursuant to F.R.A.P. 41(b), and that motion was denied by order dated August 11, 1995.

REASONS FOR GRANTING THE WRIT

I. THE *JOHNSON* RULE SHOULD HAVE BEEN APPLIED TO THIS PENDING CASE.

The Court of Appeals was given the opportunity to apply *Johnson* to this case when plaintiff filed his supplemental petition for rehearing bringing that recently decided case to the court's attention. In denying that motion, the Appeals Court refused to apply *Johnson* to a case pending before it, a decision that flies in the face of this Court's precedent on the retrospective effect of its decisions and violates one of the important rationales of *Johnson* which is to let the District Court address issues of evidence sufficiency.

A. The *Johnson* Decision.

In *Johnson*, this Court held that police officers were not entitled to take an immediate appeal from a denial of a motion for summary judgment where the basis for the denial of the motion was that there were genuine issues of material fact as to whether their conduct violated the plaintiff's constitutional rights. The Court clarified the holding of *Mitchell v. Forsyth*, the first case to permit immediate appeals in qualified immunity cases, by distinguishing between situations where the question was whether the defendants' conduct violated clearly established constitutional rights, a legal issue, and situations where there

was a legitimate dispute about the facts of the defendants' conduct. *Johnson*, 115 S. Ct. at 2156.

In the former case, immediate appeal is justified to protect the possibly immune defendant from having to go through trial. In the latter situation, there is little justification for an immediate appeal because the issues presented are factual ones with which a trial judge deals all the time and as to which "appellate judges enjoy no comparative expertise. . . ." *Id.* at 2157. Moreover, they are also issues which are similar or identical to the issues on the merits. *Id.*

B. The *Johnson* Rule Applies to This Case.

The First Circuit Court should have applied *Johnson* to this case because this is exactly the type of case to which the *Johnson* rule was intended to be applied and because rules newly formulated by this Court must be applied to cases pending at the time of the decision.

1. Applying *Johnson* to this Case will Advance the Interests It Protects.

In *Johnson*, the Court analyzes the competing considerations favoring and disfavoring immediate appeals in qualified immunity cases where the issues are solely factual and concludes that the disadvantages outweigh the advantages. *See id.* at 2157-58. One basis for the Court's holding is that

> the issue here at stake — the existence or non-existence of a triable issue of fact — is the kind of issue that trial judges, not appellate judges, confront almost daily.

Id. at 2157. This case is a good example of one in which a summary judgment motion requires fact-weighing rather than legal analysis. The District Court analyzed the record to determine whether the evidence was sufficient to dispute the defendants' claim of qualified immunity and found it to be so. App. C at 43, 848 F. Supp. at 264. This factual inquiry is properly left to the District Court under *Johnson* because, as *Johnson* notes, District Courts are good at deciding factual issues.[3] *Johnson*, 115 S. Ct. at 2157. The fact that the District Court and Appeals Court reached starkly opposite conclusions on the same record validates this Court's concern, that interlocutory appeals involving factual questions not be permitted because of the Appeals Courts' lack of "comparative expertise." *Id.*

Johnson also reflects this Court's continuing reluctance to entertain appeals of collateral orders where the factual issue on appeal is not separate from the issue presented by the merits of the case in order to avoid duplication of effort by the trial and appellate courts as well as opposite conclusions such as occurred in this case. *Johnson*, 115 S. Ct. at 2157. In *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546, 69 S. Ct. 1221, 1225-26, 93 L. Ed. 1528 (1949), the Court held that, in order for a non-final order to be appealable under the collateral order exception, it must "resolve an important issue completely separate from the merits of the action. . . ." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468, 98 S. Ct. 2454, 2458, 57 L. Ed. 2d 351 (1978). But, as the *Johnson* Court recognized,

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[3]The distinction drawn here is not between making actual fact findings as opposed to conclusions of law. It is between assessing a factual record to determine whether there is sufficient evidence to establish qualified immunity, as a matter of law as the District Court did here, and deciding a legal issue on established facts.

permitting an interlocutory appeal on an "evidence sufficiency" question in a qualified immunity case "would more than relax the separability requirement — it would in many cases abandon it." *Johnson*, 115 S. Ct. at 2157. This is true because, in most qualified immunity cases, as in this case, the facts supporting the defense are inevitably and inextricably intertwined with the merits of the claim. *Mitchell v. Forsyth*, 472 U.S. at 545-46, 105 S. Ct. at 2825-26, 86 L. Ed. 2d at 437-38 (Brennan, J. concurring and dissenting in part).

The *Johnson* Court specifically recognized that the congruence of the merits and the defense was particularly common in qualified immunity cases and disfavored immediate appeals:

> [A]n interlocutory appeal concerning this kind of issue in a sense makes unwise use of appellate courts' time, by forcing them to decide in the context of a less developed record, an issue very similar to one they may well decide anyway later, on a record that will permit a better decision.

115 S. Ct. at 2158. *Accord, Mitchell v Forsyth*, 472 U.S. at 545-46, 105 S. Ct. at 2825-26, 86 L. Ed. 2d at 437-38 (Brennan, J. concurring and dissenting in part) ("The close relationship between the immunity and the merits questions is not a consequence of the special circumstances of this case. . . . [A] case with more divergence on the facts would present the same congruence of merits and immunity questions.").

The congruence exists in this case and argues strongly against permitting an interlocutory appeal. The District Court denied the individual defendants' motion for summary judgment on the ground that, construing the record most favorably to

plaintiff, defendants failed to establish exigent circumstances as a matter of law for their hasty forcible and warrantless entry into the decedent's home. App. C at 43, 848 F. Supp. at 264. The lack of exigent circumstances made the defendants' intrusion unconstitutional and also established the basis for their liability to plaintiff under 42 U.S.C. § 1983. *See, e.g., Burns v. Loranger*, 907 F.2d 233 (1st Cir. 1990). In this case, then, the facts negating the defense of qualified immunity and the facts establishing liability are not only intertwined; they are identical.

The flaws in the First Circuit decision demonstrate the wisdom of the *Johnson* rule eliminating interlocutory appeals on fact issues. Instead of reviewing the lower court's decision by construing the record in the most favorable light to plaintiff, the Court of Appeals improperly reviewed the District Court's decision as a factfinder and concluded, based on its own view of the factual record, that the defendants were entitled to qualified immunity as a matter of law, reversing the District Judge's findings on the same issue. App. B at 27, 53 F.3d at 1379. If the *Johnson* rule is not applied, the evils it was intended to eliminate will occur in this case: there will be an inaccurate Appeals Court decision on the facts which will also be, in effect, a decision on the merits.

2. Newly Announced Rules of this Court Must be Applied to Pending Cases.

The "overwhelming [ ] norm", according to this Court, is that newly announced rules must be applied in cases pending when they are announced. *James M. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 535, 111 S. Ct. 2439, 2443, 115 L. Ed. 2d 481 (1991). As the Court pointed out in *Landgraf v. USI Film Prods.*, ____ U.S. ____, 114 S. Ct. 1483, 128 L. Ed. 2d 229 (1994):

> While it was accurate in 1974 to say that a new rule announced in a judicial decision was only *presumptively* applicable to pending cases, we have since established a firm rule of retroactivity. *See Harper v. Virginia Dept. of Taxation*, 509 U.S. ____, 113 S. Ct. 2510, 125 L. Ed. 2d 74 (1993); *Griffith v. Kentucky*, 479 U.S. 314, 107 S. Ct. 708, 93 L. Ed. 2d 649 (1987).

114 S. Ct. at 1504 n. 32 [emphasis in original]. Under that rule, the *Johnson* principle applies to this case because it was pending when *Johnson* was decided.[4]

If the Court does not apply the *Johnson* rule to this case, it will leave in place a decision of a Court of Appeals which, as will be discussed in the next section, erroneously resolves factual issues and fails to construe the record most favorably to plaintiff.

II. THE COURT OF APPEALS ERRED IN FINDING THAT THE INDIVIDUAL DEFENDANTS WERE IMMUNE FROM LIABILITY AS A MATTER OF LAW.

In order to establish qualified immunity to liability in this case, the police officer defendants must establish that they could reasonably have believed that their warrantless and forcible

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[4]There is no dispute that this case was still pending in the First Circuit Court of Appeals for purposes of applying the new rule even though it had already been decided since plaintiff's motion and supplemental motion for rehearing had not yet been decided. *See In re Resolution Trust Corp.*, 888 F.2d 57, 58 (8th Cir. 1989).

intrusion into Mrs. Hegarty's cabin was justified by exigent circumstances.

A. The Constitutional Violations.

1. The Warrantless Entry.

As the Appeals Court observed, "the Fourth and Fourteenth Amendments to the United States Constitution prohibit [ ] a warrantless entry into the Hegarty cabin to effect Katherine's arrest, except in exigent circumstances and with probable cause." App. B at 13, 53 F.3d at 1373. Under this standard, if the officers reasonably believed that they had probable cause to arrest Mrs. Hegarty and that exigent circumstances justified their warrantless entry into her home, they would be immune from liability. The question on appeal, therefore was whether plaintiff had generated genuine questions of material fact on these issues. *See Graham v. Connor*, 409 U.S. 386, 396, 109 S. Ct. 1865, 1872, 104 L. Ed. 2d 443 (1989).

The Constitution's protection of a person's right to be secure in her own premises dictates the strict rule requiring a warrant for the entry or search of a house. One of the few exceptions to that rule permits warrantless searches where "there is such a compelling necessity for immediate action" that there is no time to obtain a warrant. *United States v. Almonte*, 952 F.2d 20, 22 (1st Cir. 1991). While a warrantless intrusion may be justified by circumstances such as the need to prevent a suspect's escape, or the risk of danger to the police or to other persons inside or outside the dwelling, *see, e.g., Minnesota v. Olson*, 495 U.S. 91, 100, 110 S. Ct. 1684, 1690, 109 L. Ed. 2d 85 (1990), exigent circumstances do not support a warrantless intrusion where, as here, "[i]t was evident the suspect was going

nowhere. If he had come out of the house, he would have been promptly apprehended." *Id.* at 101, 110 S. Ct. at 1690, *quoting State v. Olson*, 436 N.W.2d 92, 97 (Minn. 1989).

2. Use of Excessive Force.

The propriety of using of excessive force in effecting a warrantless entry is judged on the basis of the objective reasonableness of the officers' actions based on the totality of circumstances. *See, e.g., Graham v. Connor.* Reasonableness is generally an issue of fact, *e.g., Hydrogen Technology Corp. v. United States*, 831 F.2d 1155, 1164 (1st Cir. 1987), and if there are any disputed issues of fact as to the objective reasonableness of the defendants' use of force to enter the Hegarty home, summary judgment is inappropriate.

The District Court denied defendants' motion for summary judgment on qualified immunity on the ground that, "[b]ased on the facts viewed in the light most favorable to Plaintiff, the officers could not reasonably have believed that their forcible intrusion into Hegarty's home was justified by exigent circumstances." App. C at 43, 848 F. Supp. at 264. The Court of Appeals for the First Circuit reversed on the ground that

> a competent police officer — possessing the same information the defendant officers had on May 15, 1992 — reasonably could have believed both that there existed probable cause to arrest Katherine Hegarty and exigent circumstances justifying their immediate warrantless entry.

App. B at 27, 53 F. 3d at 1379. This decision was erroneous because it improperly resolved fact issues and failed to construe the record in the light most favorable to the plaintiff.

B. The Appeals Court Erred in Relying Upon Defendants' Version of Events that had been Properly Controverted by Plaintiff in the Trial Court.

In order to enter summary judgment against a plaintiff or to affirm summary judgment on appeal, the court must "assume[ ] all facts in plaintiff's favor. . . ." *Prokey v. Watkins*, 942 F.2d 67, 73 (1st Cir. 1991). The Court of Appeals failed to do that in this case, and its judgment must be vacated.

1. The Appeals Court Erred by Significantly Overstating Katherine Hegarty's Mental Condition Based Upon Controverted Evidence to Justify the Forcible Intrusion into Her Home.

The First Circuit Court erroneously based its decision immunizing the defendants in part on "facts" about Katherine Hegarty's mental condition that were vigorously disputed. For example, the Court justified the officers' decision to break into Katherine's home in part on the "violent, irrational and unpredictable behavior recently exhibited by their barricaded suspect, including her bouts of laughter, history of emotional instability and demonstrated antagonism toward law enforcement personnel." App. B at 26 [Slip op. at 26], 53 F.3d at 1378-79.

Whether Mrs. Hegarty had a history of emotional instability, was violent, irrational, or unpredictable, or was antagonistic to the police are fact issues which were all

specifically and seriously contested by plaintiff. *See, e.g.*, J.A. 847, 849-50, 851-52, 859-60 (Plaintiff's Response to Somerset County Defendants' Statement of Material Fact (Pl. Resp.), ¶¶ 4, 6, 9, 18, specifically controverting allegations that Katherine had mental problems made in Somerset County Defendants' Statement of Undisputed Facts, ¶¶ 4, 6, 9, 18, J.A. 544-45, 545-46, 547, 551-52). The Appeals Court's acceptance of these assertions as undisputed facts constitutes serious error because the court failed to view the facts in the light most favorably to plaintiff.

Mrs. Hegarty had lived in Jackman for 19 years. J.A. 881 (Affidavit of John Hegarty (Hegarty Aff.), ¶ 3). With the exception of one arrest for driving under the influence, she had no history of contacts with law enforcement nor any criminal record. The only evidence in the record that Mrs. Hegarty was aggressive or violent consisted of one prior incident of a brief struggle with a police officer against whom she later brought a complaint. There is no admissible evidence of emotional instability. *See* J.A. 612-13 (Aff. of Officer Giroux, ¶¶ 12-16).

The Appeals Court characterized the campers' experience with Katherine as a "harrowing encounter with an intoxicated, distraught ('flipped out') and armed woman who might pursue them to the truck stop and shoot at them." App. B at 6, 53 F.3d at 1370. This statement grossly distorted what the record shows was the campers' reaction to their confrontation with Katherine Hegarty.[5] First, the campers "did not believe that she followed

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[5]One of the reasons that so many different factual versions of the events which gave rise to this lawsuit exist is that the officers themselves each gave several statements, as well as having been deposed. *See* A. 845a [Pl. Resp. at 1]. These differing versions of the facts create credibility issues which cannot (continued...)

them beyond the gate which was 1.5 miles from her camp. J.A. 200 (Hines Dep. at 113)." J.A. 817 (Pl.'s St., ¶ 12). In his statement to one of the defendant officers, Mr. Day, one of the campers, said that "she stopped right there [at the gate], turned her vehicle around and went back down the road again." J.A. 1224 (Day St. to Tappan).

Second, there is substantial evidence in the record that Mrs. Hegarty was not "distraught" or "flipped out", but only justifiably upset that the men had camped without permission so close to her isolated cabin, where she was alone,[6] had trespassed on her property to get there, and had started an illegal fire. J.A. 815-16 (Pl.'s St., ¶¶ 6-9). Paragraph 9 of that statement reads as follows:

> Ms. Hegarty kept asking the four men who had given them permission or the right to come through her gate, and asked whether they had a key for the gate; none of them responded that they had a key or permission to dismantle the gate.

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[5](...continued)
be resolved on summary judgment. *E.g., Lallemond v. Univ. of Rhode Island*, 9 F.3d 214, 215 (1st Cir. 1993); *Davis v. United States*, 705 F. Supp. 446, 454 (C.D. Ill. 1989).

As might be expected, defendants used the most favorable statements of each officer in making their arguments, and the Court of Appeals apparently followed the same practice. Where the summary judgment record contains more than one version of a specific fact, however, the reviewing court *must* use the version more favorable to the non-moving party in determining whether material fact issues exist. *See, e.g., Prokey v. Watkins*, 942 F.2d 67, 73 (1st Cir. 1991).

[6]Her husband, John, was in Florida on business that night; her two sons were also away. A. 827 (Pl.'s St.), 883-84 (Hegarty Aff., ¶¶ 9, 10).

> Ms. Hegarty was very upset, and at one point said, 'This is my house and you're invading my privacy'.

J.A. 816 (Pl.'s St.).

In assuming the truth of the allegation that Katherine Hegarty had a reputation for being irrational and violent, App. B at 7, 53 F. 3d 1370-71, the Appeals Court did not construe the record most favorably to plaintiff because there was evidence that she was not erratic, violent or irrational. These facts are material because the Court of Appeals supported its conclusion that the officers were immune in part on a less favorable view of the facts. *See* App. B. at 16-17, 20, 23-26, 53 F.3d at 1375-78. In dismissing the District Court's finding that no competent officer could have formed an objectively reasonable belief that exigent circumstances justified a forcible, warrantless entry into Katherine Hegarty's cabin, the First Circuit Court also relied on evidence of her mental condition which was contested. *Id.* at 16-20, 53 F.3d at 1375-76.

If one removes the element of Katherine Hegarty's emotional instability from the Circuit Court's analysis of exigency, no support for the court's conclusion that exigent circumstances justified the officers' course of behavior exists. Without reliable evidence of instability, there would have been no reason not to wait for a warrant or for the tactical team. There would be no reason for concern about irrational behavior on the part of Katherine Hegarty which might harm one of the officers. As the District Court concluded, "[b]ased on the facts viewed in the light most favorable to Plaintiff, the officers could not reasonably have believed that their forcible intrusion into Hegarty's home was justified by exigent circumstances." App. C at 43, 848 F. Supp. at 264. The Circuit Court's opposite

conclusion is based on a view of the record evidence which is less favorable to plaintiff than the law requires and is therefore legal error.

2. The Court Significantly Overstated the Importance of Locating Mrs. Hegarty by Relying Upon Claims of Defendants that were Properly Controverted by Plaintiff.

The Appeals Court also construed the record less favorably than required by law in concluding that the most important problem facing the officers as they went to the Hegartys' home was that they did not know where Katherine Hegarty was. The court concluded that "a competent police officer reasonably could have believed that exigent circumstances warranted approaching the cabin walls — *forthwith and unannounced* . . . .". App. B at 23, 53 F.3d 1377 [emphasis in original]. The exigent circumstance it identified was that the defendants did not know where Mrs. Hegarty was before they got to the cabin and were justified in creeping in on her because she might be "lying in wait in the woods."

The bases for the Circuit Court's conclusion include the "fact" that Katherine was last seen chasing the trespassers several hours earlier and the possibility that there were campers near the cabin who would be endangered by her presence. App. B at 20, 53 F.3d at 1376. However, the evidence was that Mrs. Hegarty did not follow the campers beyond the gate to her road, which is 1.5 miles from the cabin, J.A. 817 (Pl.'s St.), 1224 (Day St.), and that there were no campsites nearer than 1.5 miles to the Hegarty cabin. J.A. 884-85 (Hegarty Aff., ¶ 13). Instead of being seen as the "overarching reality confronting the officers at the most critical moment of decision," App. B at 19-20, 53 F.3d at 1376, whether the officers knew where Katherine was before

they got to the cabin should have been viewed as an issue of disputed fact requiring determination by a fact finder, particularly given that her truck was parked in front of her cabin, and her radio was blaring loudly, as the officers approached her cabin just before midnight. *See* App. C at 37-38, 848 Supp. at 262, J.A. 822 (Pl.'s St.). Thus, if the appropriate inquiry is what an objectively reasonable officer would have believed, *see, e.g. Burns v. Loranger*, 907 F.2d at 236, there was evidence present *as soon as the officers arrived at her home* that Katherine Hegarty was inside. Construing the record most charitably to plaintiff negates the basis for the First Circuit's conclusion that a competent police officer could have believed that exigent circumstances warranted a speedy and surreptitious approach to Mrs. Hegarty's cabin.

More important, the evidence also shows that "[f]rom the time the Defendant officers arrived at Plaintiff's cabin to the time Ms. Hegarty was shot to death, only approximately 9 to 12 minutes elapsed. (Atwood Dep. Exh. #48, attached as Exh. B15 to Sweet Affidavit; 5/21/92 videotape reconstruction, attached as Exh. A to Sweet Affidavit)." J.A. 826 (Pl.'s St. ¶ 34).[7] The Court's conclusion that these officers were not justified in breaking down Mrs. Hegarty's door and shooting her only 9 to 12 minutes after they arrived, having made no attempt to negotiate or to consider any other alternatives, is clearly based on the Court's complete acceptance of defendants' version of the evidence, and not on the evidence construed most favorably to plaintiff.

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[7]From the time she was awakened by the officers, Mrs. Hegarty had only about three minutes to live. *See* A. 1027a [Statement of Dep. Sgt. Crawford].

The District Court, construing the evidence favorably, found that several officers stated that "just prior to the entry, Hegarty posed no immediate danger to themselves or anyone else," App. C. at 42, 848 F. Supp. at 264, and that the officers were not justified, in breaking into Katherine Hegarty's house and shooting her only 9 to 12 minutes after they arrived. Certainly, the officers' justification and motivation are disputed issues of fact which should have precluded the entry of summary judgment by the Appeals Court.

C. The Appeals Court Erred in Concluding that the Defendants Were Immune from Liability for Breaking Down Mrs. Hegarty's Door and Shooting Her to Death.

The final and critical issue presented by this case is what an objectively reasonable police officer would do once he had located Mrs. Hegarty and there was no immediate danger of harm to the other officers. The Appeals Court's answer to that question was that forcibly breaking into the house and killing Mrs. Hegarty after being at the cabin for less than 15 minutes is reasonable police conduct *as a matter of law*. That conclusion is legally unsupported and in conflict with precedents of this Court in light of the many unresolved and disputed fact issues on this record, any of which, if decided by a jury in plaintiff's favor, would defeat defendants' claim of immunity. For example, if a jury were to find that Mrs. Hegarty was not irrational or violent, the record support for the Court's conclusion that quick action by the officers was required disappears.

Perhaps the most important fact issue addressed below was the Appeals Court's decision that the forcible entry into Mrs. Hegarty's home was reasonable police conduct. This

conclusion is in absolute conflict with the plaintiff's expert's opinion that such an entry was probably the *most* dangerous option under these circumstances. *See* J.A. 890, 895 (McClaran Aff., ¶¶ 9, 18). Mr. McClaran is a former Chief of Police for the City of Portland, Maine, has a Ph. D. in criminal justice, and teaches criminal justice at Southern Maine Technical College. J.A. 886 (McClaran Aff., ¶1), 901. He testified at his deposition, that breaking into the Hegarty cabin was "unnecessary and excessive and a provocative act on [the officers'] part which led to the death of Katherine Hegarty." J.A. 386 (McClaran Dep.). In Mr. McClaran's opinion, in a barricade-type situation, forcible entry should be the last option because of the danger it poses to both officers and subject, particularly where, as here, no warning was given and the person to be arrested was not given the opportunity to surrender. *See* J.A. 892, 894-95 [McClaran Aff., ¶¶ 14, 17, 18]. Nonetheless, the court of appeals either ignored or distorted Mr. McClaran's opinion and, in doing so, overlooked yet another instance in which construction of the record in plaintiff's favor should have compelled the conclusion that disputed material issues of fact precluded the entry of summary judgment.

The Court of Appeals ultimately concluded, as a matter of law, that the defendants were immune for breaking into Katherine Hegarty's cabin and shooting her to death because of reasonable concerns about "the need to ascertain Katherine's precise location as soon as possible, her unpredictable behavior and the lack of protective cover for their own movements in locating and containing her." App. B at 24, 53 F.3d at 1378. This conclusion stands in stark contrast to the District Court's decision on the same issue and the same record:

> Exigent circumstances did not exist in this case nor was it reasonable for the officers involved to

> believe that such circumstances existed. . . . There was virtually no likelihood that Hegarty would escape if not swiftly apprehended. Just before the officers began the forcible entry, Hegarty was kneeling on her couch within the sight of the officers and speaking with the officers.

App. C at 42, 848 F. Supp. at 264. The District Court also rejected out of hand the officers' fear of injury to Katherine or to themselves as a basis for the break-in:

> The Court is not persuaded . . . that such fears were reasonable under these facts. In fact, several officers have stated that, just prior to the entry, Hegarty posed no immediate danger to themselves or anyone else.
>
> . . . .
>
> [T]he officers decided to enter Hegarty's home forcibly and after it appeared that she had put down her rifle. Hegarty did not threaten injury to herself at any time nor were other individuals in danger.

Id. The very fact that a trial court and appellate court can reach such divergent results on the same record compels the conclusion that there are unresolved and disputed fact issues as to the ultimate question of whether these officers were justified in breaking into Mrs. Hegarty's home and killing her

D. The First Circuit Should Have Applied the *Johnson* Rule.

The foregoing analysis of the First Circuit's decision demonstrates yet another problem with permitting interlocutory appeals of qualified immunity decisions. Not only do such appeals waste precious judicial resources; they also permit the Court of Appeals to exercise a fact-finding function for which they have neither authority nor expertise. *Johnson*, 115 S. Ct. at 2157. It might be argued that *Johnson* should not apply to this case because the appellate court had already reviewed the record and made its decision, so that the preservation of resources rationale of *Johnson* would not apply. The First Circuit's decision, however, demonstrates another shortcoming of the rule: the possibility of an appeals court's resolving factual issues incorrectly and without construing the record in the light most favorable to the plaintiff. Applying the *Johnson* rule in this case will address the Court's concern with abuse of the appellate process in interlocutory fact-based appeals.

CONCLUSION

For the reasons set out herein, this Court should grant the plaintiff's petition for certiorari and should remand this case to

the Court of Appeals for the First Circuit with instructions to reconsider its decision in light of *Johnson v. Jones*. By granting the petition, this Court will also be remedying a clear injustice.

Respectfully submitted,

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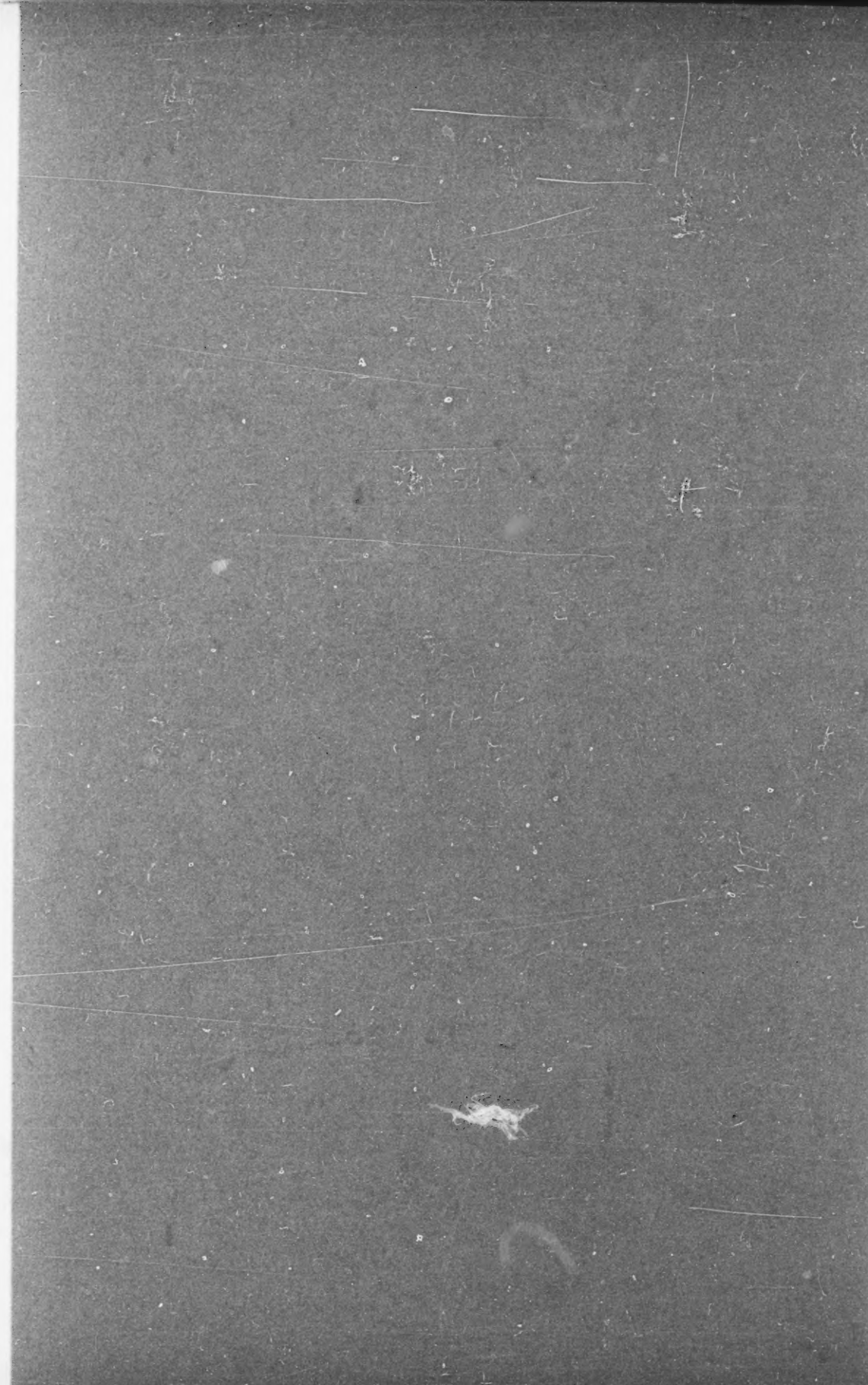
Oct. 16, 1995

APPENDICES



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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 94-1473

JOHN M. HEGARTY AS PERSONAL REPRESENTATIVE
OF THE ESTATE OF KATHERINE A. HEGARTY,
Plaintiff, Appellee,
v.
SOMERSET COUNTY, RENE GUAY, WILFRED HINES,
THOMAS GIROUX, JR., WILLIAM CRAWFORD, JR.,
Defendants, Appellants.

No. 94-1474

JOHN M. HEGARTY AS PERSONAL REPRESENTATIVE
OF THE ESTATE OF KATHERINE A. HEGARTY,
Plaintiff, Appellee,
v.
SOMERSET COUNTY, ET AL.,
Defendants, Appellants.

No. 94-1517

JOHN M. HEGARTY, INDIVIDUALLY AND AS
PERSONAL REPRESENTATIVE
OF THE ESTATE OF KATHERINE A. HEGARTY,
Plaintiff, Appellant,
v.
SOMERSET COUNTY, ET AL.,
Defendants, Appellees.

BEFORE

TORRUELLA, Chief Judge,
BOWNES, Senior Circuit Judge,
SELYA, CYR, BOUDIN, STAHL, LYNCH, Circuit Judges,
and McAULIFFE*, District Judge.

ORDER OF COURT

Entered: July 20, 1995

The panel ot judges that rendered the decision in the above captioned cases having voted to deny the petition for rehearing and the supplemental petition for rehearing and the suggestion for the holding of a rehearing en banc and the supplemental suggestion for the holding of a rehearing en banc having been carefully considered by the judges of this court in regular, active service and a majority of said judges not having voted to order that these appeals be heard or reheard en banc,

It is ordered that the petitions for rehearing and the suggestions for rehearing en banc be denied.

By the Court:
/s/ Francis P. Scigliano
Clerk

[cc: Messrs. Monahan, Fisher, Badger, Singal, Mogul, Warren,Simmons, Thaler, Sweet, Ms. Murray]

*of the District of New Hampshire, sitting by designation

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 94-1473

JOHN M. HEGARTY AS PERSONAL REPRESENTATIVE OF THE ESTATE OF KATHERINE A. HEGARTY,
Plaintiff, Appellee,

v.

SOMERSET COUNTY, RENE GUAY, WILFRED HINES, THOMAS GIROUX, JR., WILLIAM CRAWFORD, JR.,
Defendants, Appellants.

No. 94-1474

JOHN M. HEGARTY AS PERSONAL REPRESENTATIVE OF THE ESTATE OF KATHERINE A. HEGARTY,
Plaintiff, Appellee,

v.

SOMERSET COUNTY, ET AL.,
Defendants, Appellants.

No. 94-1517

JOHN M. HEGARTY, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF KATHERINE A. HEGARTY,
Plaintiff, Appellant,

v.

SOMERSET COUNTY, ET AL.,
Defendants, Appellees.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MAINE

[Hon. Morton A. Brody, *U.S. District Judge*]

Before

Cyr, *Circuit Judge*,
Bownes, *Senior Circuit Judge*,
and McAuliffe*, *District Judge*.

William R. Fisher, with whom *Monaghan. Leahy, Hochadel & Libby* was on brief for appellants Guay, Hines, Giroux and Crawford and defendant/appellee Spencer Havey.

Frederick J. Badger, Jr., with whom *Ann M. Murray* and *Richardson, Troubh & Badger* were on brief for appellant Wright.

Julian L. Sweet, with whom *Jeffrey A. Thaler* and *Berman & Simmons, P.A.* were on brief for plaintiff/appellant Hegarty.

May 17, 1995

CYR, Circuit Judge. On May 15, 1992, state and county law enforcement officers forcibly entered a remote cabin in the Maine woods, without a warrant, and mortally wounded

*Of the District of New Hampshire, sitting by designation.

plaintiff's decedent, Katherine A. Hegarty, while attempting to arrest her for recklessly endangering the safety of four campers. Plaintiff John M. Hegarty initiated the present action in federal district court for compensatory and punitive damages against the defendant officers and their respective supervisors, based on alleged violations of the Hegartys' statutory and constitutional rights. *See* 42 U.S.C. 1983 (1992); Me. Rev. Stat. Ann. tit. 5, 4682 (1992). After rejecting their qualified immunity claims, the district court determined that the defendant officers were potentially liable for punitive damages, and the officers initiated an interlocutory appeal. Plaintiff John M. Hegarty in turn cross appealed from district court orders granting summary judgment in favor of Somerset County Sheriff Spencer Havey on qualified immunity grounds and disallowing plaintiff's section 1983 claim for compensatory damages for loss of spousal consortium.

I.
BACKGROUND[1]

A. *The Warrantless Entry*

During the morning of the fateful day, two vehicles, containing four campers, entered through a gate onto woodlands owned by a paper company in Jackman, Maine, and proceeded to their assigned campsite about one and one-half miles past the gate and 200 yards or so beyond the Hegarty cabin. At around 9:00 that evening, Katherine Hegarty became extremely agitated when she saw the campers returning to their campsite for the night, and began screaming that they had trespassed on her

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[1]The relevant facts are related in the light most favorable to the plaintiff, the party resisting summary judgment. *Velez-Gomez v. SMA Life Assurance Co.*, 8 F.3d 873, 874-75 (lst Cir. 1993).

property. The campers assured her that the caretaker had given them permission to use the campsite and they would be leaving the next morning. To which Katherine responded: "Only if you make it until morning." She then retrieved a rifle from inside the cabin and fired six rounds from the porch in the direction of the campers, who immediately took cover behind their trucks and boat.

During the next hour or so, Katherine reloaded her rifle several times, firing approximately twenty-five additional rounds in the direction of the campers before eventually yielding to their pleas for permission to depart in safety. Leaving their other belongings behind, the campers drove their vehicles quickly past the cabin, where they saw Katherine on the porch, rifle in hand. Although no further shots were fired, Katherine followed the campers in her truck beyond the entrance gate, then turned back in the direction of her cabin.

Upon their arrival at a truck stop located on Route 201, approximately two miles from the woods road entrance gate, the campers immediately placed a telephone call to the Somerset County Sheriff's Department. Their report described a harrowing encounter with an intoxicated, distraught ("flipped out") and armed woman who might pursue them to the truck stop and shoot at them. Four law enforcement officers were dispatched to the truck stop — Maine State Trooper Gary Wright and three Somerset County Sheriff's Department officers: Patrol Sergeant Wilfred Hines, Deputy Sheriff Rene Guay, and Reserve Officer Thomas Giroux, Jr.

After briefly interviewing the four campers, the officers decided that the suspect had committed at least one offense by shooting at the campers. *See* Me. Rev. Stat. Ann. tit. 17-A, 211 (1994) (reckless endangerment). Moreover, from the

description the campers gave of the woman, the locations of the cabin and the campsite, and from their knowledge of the area, the officers concluded that Katherine Hegarty was their suspect. The officers knew that Katherine was an experienced hunter and a licensed Maine guide, with a reputation as a "crack shot," and that she kept several powerful firearms at her cabin. Further, the officers knew she had some history of emotional instability (i.e., a nervous "breakdown" in 1991, requiring sedation, physical restraints and a brief period of involuntary hospitalization), substance abuse (two arrests for operating a motor vehicle while under the influence of alcohol ("OUI") in 1991), and incidents of erratic, violent behavior directed at law enforcement personnel — kicking and throwing punches at State Trooper Gary Wright, asking irrational questions, and exhibiting extreme mood swings (alternately screaming and laughing) at the time of her first OUI arrest, and an enforcement officers were dispatched to the truck stop assault/harassment against Trooper Wright at his residence shortly after the same arrest. For these reasons, the officers concluded that they should arrest Katherine immediately, without obtaining a warrant or informing her of their true intentions until after she had been restrained, for fear that she would become violent.

At around midnight, the officers rendezvoused with a fifth officer, Sergeant William Crawford, Jr., of the Somerset County Sheriff's Department, drove about three miles and parked their cruisers approximately a mile from the Hegarty cabin. Their sporadic discussions since meeting at the truck stop had led to a skeletal plan of action for effecting the arrest. Concerned that Katherine might be waiting for them somewhere in the vicinity, they proceeded on foot toward her cabin, led by Trooper Wright — with a police dog — in an effort to forewarn themselves of Katherine's presence without heralding their approach. As they neared, at approximately 12:15 a.m., the

officers observed Katherine's truck in front of the darkened cabin and heard a radio blaring music from inside. The clearing surrounding the cabin was plainly visible in the moonlight, but the cabin interior was not illuminated.

Following a quick visual inspection of the cabin site and the interior of the Hegarty truck, four officers approached unannounced and placed themselves along the outer cabin walls. The fifth officer, Thomas Giroux, Jr., who was better acquainted with Katherine Hegarty, gave a prearranged signal to the other officers from behind a tree across the road in front of the cabin. Giroux began calling to Katherine by name — first identifying himself and then expressing concern for her safety — in an attempt to coax her from the cabin to speak with him. Giroux heard no response above the blaring radio. Sergeant Hines then pounded on the cabin door and identified himself as a deputy sheriff. He received no response.

Meanwhile, Sergeant Crawford, who had worked his way around to the rear of the cabin, shined a flashlight into a darkened window and saw a fully-clothed woman lying on a bed, with a rifle astride her chest. When the woman began to raise the rifle in his direction, Crawford dove for cover, yelling out to the other officers that there was an armed person inside the cabin. Katherine soon asked Crawford to identify himself. After he did so, Crawford heard Katherine leave the bedroom and move toward the front of the cabin. The radio soon became inaudible.

As Katherine walked about inside the darkened cabin, she kept asking what the officers were doing there, and requested that they leave her property. The officers replied that they were investigating a report of campsite burglaries in the area, were concerned for her safety, and wanted her to come out of the

cabin so she could speak with them. Laughing intermittently during these exchanges, Katherine ultimately rejected their requests — stating that she had seen no one suspicious.

Deputy Sheriff Rene Guay — posted outside the closed window at the front of the cabin — next saw Katherine face-to-face as she peered out the window from a kneeling position on a nearby couch. When Guay trained his flashlight on her, Katherine said, "I can see you." At this time, Guay observed that Katherine had no weapon in hand nor within the vicinity illuminated by his flashlight. Guay immediately communicated this information to Sergeant Hines and Trooper Wright, who were posted on either side of the front door, then gave them a signal to "go."

Sergeant Hines proceeded to break in the front door, but a chain lock momentarily delayed entry. From a crouched position outside the front window, Guay saw Katherine pick up a rifle beside the couch and begin to raise it in the direction of Hines and Wright, who were about to break through the front door. As she continued to raise the rifle in their direction, the officers ordered her to drop it. Katherine paid no heed and was fatally wounded by the officers before she could fire a shot.

B. *The District Court Proceedings*

In January 1993, John Hegarty, in his individual and representative capacities, filed a four-count complaint in the District of Maine against, *inter alia*, the five officers and their respective supervisors, alleging deprivations of the Hegartys' Fourth and Fourteenth Amendments rights, *see* 42 U.S.C. 1983 (1994), and their state and federal statutory and constitutional rights under the Maine Civil Rights Act

("MCRA"), Me. Rev. Stat. Ann. tit. 5, 4682 (1994).[2] All defendants moved for summary judgment, asserting qualified immunity from suit under section 1983 and the MCRA. and contending that neither punitive damages, nor compensatory damages for loss of spousal consortium, are recoverable against them under section 1983 or the MCRA.

The district court ruled, *inter alia*, that (1) the five officers at the scene were not immune from suit under either section 1983 or the MCRA, because no objectively reasonable police officer could have concluded that the circumstances confronting these officers gave rise to an exigency sufficient to justify forcing a warrantless entry into the Hegarty cabin for the purpose of effecting Katherine's immediate arrest; (2) punitive damages would be recoverable were a jury to find that the officers at the scene acted with reckless indifference; (3) Somerset County Sheriff Spencer Havey was entitled to qualified immunity from suit relating to any "supervisory liability," since he had no advance notice that officer training was deficient, and since his subsequent conduct, though "troublesome," did not constitute "gross or reckless indifference"; and (4) compensatory damages for loss of consortium were not recoverable absent proof that the officers' conduct had been directed at John Hegarty rather than at his deceased spouse alone.

The officers promptly took interlocutory appeals from the first and second district court rulings. *See Febus-Rodriguez v. Betancourt-Lebron*, 14 F.3d 87, 90 (lst Cir. 1994) (disallowance of qualified immunity claim is "final" appealable order under *Cohen* "collateral order" doctrine). After the district court

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[2]No appeal was taken from the district court judgment dismissing the wrongful death, see Me. Rev. Stat. Ann. tit. 18-A, 2-804 (1994), and common-law trespass claims.

directed that final judgment enter pursuant to Fed. R. Civ. P. 54(b) on its third and fourth rulings, plaintiff John Hegarty cross-appealed.

II
DISCUSSION

A. *The Officers' Immunity Claims*

1. *Standard of Review*

We review a summary judgment order *de novo*, under the identical criteria governing the district court, to determine whether "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *see Jirau-Bernal v. Agrait*, 37 F.3d 1, 3 (lst Cir. 1994). All contested facts are viewed in the light most favorable to the party resisting summary judgment. *Id.*

2. *The Qualified Immunity Doctrine*

Like other government officials performing discretionary functions, law enforcement officers hailed into court in their individual capacities to respond in damages are entitled to qualified immunity from suit in civil rights actions under section 1983, provided their conduct did "not violate clearly established statutory or constitutional rights of which a reasonable [police officer] would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *Burns v. Loranger*, 907 F.2d 233, 235 (lst Cir. 1990). In *Anderson v. Creighton*, 483 U.S. 635 (1987), the Supreme Court refined the focus of the policy considerations underlying the qualified immunity doctrine.

> When government officials abuse their offices, "action[s] for damages may offer the only realistic avenue for vindication of constitutional guarantees." *Harlow v. Fitzgerald*, 457 U.S., at 814. On the other hand, permitting damages suits against government officials can entail substantial social costs, including the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties. *Ibid.* Our cases have accommodated these conflicting concerns by generally providing government officials performing discretionary functions with a qualified immunity, shielding them from civil damages liability as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated. *See, e.g., Malley v. Briggs*, 475 U.S. 335, 341 (1986) . . . .

Anderson, 483 U.S. at 638.[3] As this court has explained,

> appellate assessment of [a] qualified immunity claim is apportioned into two analytic components. First, if the right asserted by the plaintiff was "'clearly established" at the time of its alleged violation, we are required to assume that the right was recognized by the defendant official, *see Harlow*, 457 U.S. at 818, 102 S. Ct. at 2738; *Rodriguez v. Comas*, 888 F.2d 899, 901 (lst Cir. 1989); second, we will deny the immunity claim

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[3]The same "qualified immunity" analysis applies to the MCRA claims. *See Jenness v. Nickerson*, 637 A.2d 1152, 1159 (Me. 1994).

> if a reasonable official situated in the same circumstances should have understood that the challenged conduct violated that established right, *see Anderson*, 483 U.S. at 640-41, 107 S. Ct. at 3039; *Rodriguez*, 888 F.2d at 901.

Burns, 907 F.2d at 235-36.

The Hegartys correctly contend, of course, that the Fourth and Fourteenth Amendments to the United States Constitution prohibited a warrantless entry into the Hegarty cabin to effect Katherine's arrest, except in exigent circumstances and with probable cause. *See Welsh v. Wisconsin*, 466 U.S. 740, 749 (1984); *Payton v. New York*, 445 U.S. 573, 586 (1980); *Buenrostro v. Collazo*, 973 F.2d 39, 43 (lst Cir. 1992). Indeed, the constitutional rights allegedly violated were clearly established long before this tragic incident occurred. Accordingly, the defendant officers are deemed to have been on notice of the relevant constitutional protections constraining their actions. *Burns*, 907 F.2d at 235-36. Therefore, qualified immunity affords the defendant officers no safe haven unless an *objectively* reasonable officer, similarly situated, *could have believed* that the challenged police conduct did not violate the Hegartys' constitutional rights. *Id.* at 236.

Thus, the qualified immunity inquiry does not depend on whether the warrantless entry was constitutional, but allows as well for the inevitable reality that "*law enforcement officials will in some cases reasonably but mistakenly conclude* that [their conduct] is [constitutional], and . . . that . . . *those officials* — like other officials who act in ways they reasonably believe to be lawful — *should not be held personally liable*." *Anderson*, 483 U.S. at 641 (emphasis added); *Burns*, 907 F.2d at 237. In other words, qualified immunity sweeps so broadly that "all but the

plainly incompetent or those who knowingly violate the law" are protected from civil rights suits for money damages. *Hunter v. Bryant*, 502 U.S. 224, 229 (1991) (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)); *cf. Roy v. City of Lewiston*, 42 F.3d 691, 695 (lst Cir. 1994) ("[T]he Supreme Court's standard of reasonableness is comparatively generous to the Police where potential danger, emergency conditions or other exigent circumstances are present.").

Lastly, we assess the challenged police conduct with a view to determining its "*objective legal* reasonableness," *Anderson*, 483 U.S. at 639 (emphasis added), which entails two pivotal features. First, the qualified immunity inquiry takes place prior to trial, on motion for summary judgment, see *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) (qualified immunity provides a shield against the *burdens of litigation, not merely* a defense against liability for money damages), and requires no factfinding, only a ruling of law strictly for resolution by the court, *see Amsden v. Moran*, 904 F.2d 748, 752-53 (lst Cir. 1990), *cert. denied*, 498 U.S. 1041 (1991); *Hall v. Ochs*, 817 F.2d 920, 924 (lst Cir. 1987). Thus, under the policy-driven "objective *legal* reasonableness" analysis governing our inquiry, even expert testimony relating to appropriate *police procedures* in the circumstances confronting the officers may not afford certain insulation against summary judgment in the "qualified immunity" context.

We turn then to consider whether an objectively reasonable police officer could have believed — in the circumstances prevailing *before* Katherine Hegarty was mortally wounded — that "exigent circumstances" and "probable cause" existed for the forcible, warrantless, nighttime entry into the Hegarty cabin.

3. *The Qualified Immunity Analysis*

(i) *Probable Cause*

The "probable cause" requirement was met if the officers at the scene collectively possessed, *Burns*, 905 F.2d at 236 n.7, "reasonably trustworthy information [sufficient] to warrant a prudent [person] in believing that [Katherine Hegarty] had committed or was committing a [criminal] offense." *Beck v. Ohio*, 379 U.S. 89, 91 (1964). As the Supreme Court has explained, "[i]n dealing with probable cause, . . . as the very name implies, we deal with probabilities. These are not technical they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." *Illinois v. Gates*, 462 U.S. 213, 231 (1983) (quoting *Brinegar v. United States*, 338 U.S. 160, 176 (1949)). *See also Burns*, 907 F.2d at 236 (quoting *Gates*).

On appeal, the plaintiff contests the assumption indulged *arguendo* by the district court - that there was probable cause for Katherine Hegarty's arrest. He argues that no competent officer in these circumstances reasonably could have believed that Katherine — a "crack shot" — intended to harm the campers, especially since no bullets struck the trucks and boat behind which the campers took cover. We do not agree. Rather, based on the information that Katherine may have been intoxicated, an objectively reasonable officer could have concluded that her errant aim was not attributable to a lack of intent to endanger. Consequently, we conclude, based on the "reasonably trustworthy information" available to the defendant officers at the scene, *see supra* pp. 3-8, that an objectively reasonable police officer could have formed the belief that there was probable cause to arrest Katherine Hegarty for the offense of reckless endangerment. *See, e.g.*, Me. Rev. Stat. Ann. tit.

17-A, 211 ("A person is guilty of reckless conduct if he recklessly creates a substantial risk of serious bodily injury to another person."); § 15 (authorizing warrantless arrests for reckless conduct with a firearm).

(ii) *Exigent Circumstances*

A warrantless, forcible entry of a private residence is permissible in certain limited circumstances, including: (1) "hot pursuit" of a fleeing felon; (2) threatened destruction of evidence inside a residence before a warrant can be obtained; (3) a risk that the suspect may escape from the residence undetected; or (4) a threat, posed by a suspect, to the lives or safety of the public, the police officers, or to herself. *See Minnesota v. Olson*, 495 U.S. 91, 100 (1990). We have held that a cognizable exigency must present a "compelling necessity for immediate action that w[ould] not brook the delay of obtaining a warrant." *United States v. Almonte*, 952 F.2d 20, 22 (lst Cir. 1991), *cert. denied*, 112 S. Ct. 1776 (1992) (quoting *United States v. Adams*, 621 F.2d 41, 44 (lst Cir. 1980)). Conversely, certain mitigating factors may undermine a showing of exigent circumstances; for example, where the criminal offense was not sufficiently serious (a traffic violation), *Welsh*, 466 U.S. at 753 n.6, the opportunity afforded the suspect for peaceable surrender was inadequate, or the entry occurred in the nighttime. *See generally United States v. Adams*, 621 F.2d 41, 44 (lst Cir. 1980).

The defendant officers challenge the district court ruling that no competent police officer could have formed an objectively reasonable belief that "exigent circumstances" justified a forcible, warrantless entry for the purpose of effecting Katherine Hegarty's immediate arrest. They argue that it was reasonable to believe — based on the reasonably trustworthy

information available to them at the time — that Katherine posed an imminent and unpredictable threat to their safety, and to herself.

Earlier in the day, Katherine had engaged in violent, life-threatening conduct against peaceable, unarmed campers. She was known to have demonstrated emotional instability and hostility toward law enforcement personnel in the past, which had prompted her to attack and threaten State Trooper Wright on two separate occasions. At the cabin, she pointed a rifle directly at Sergeant Crawford, exhibited irrational and possibly suicidal behavior (laughing "like a witch") in response to the officers' repeated requests that she discuss matters with them. The defendant officers maintain that she could have decided at any time to fire at them through the "paper thin" cabin walls or as they attempted to retreat across the moonlit clearing. Consequently, the officers contend, there was an ongoing exigency which made it reasonable to attempt to disarm Katherine whenever it appeared least likely that she possessed or could retrieve a weapon.[4]

Plaintiff acknowledges that the officers did *not* use excessive force to protect themselves after they forcibly entered the cabin and were confronted by Katherine, with rifle raised. *Cf. Roy*, 42 F.3d at 695-96. Rather, he contends that their precipitous and ill-conceived strategy — arrived at before the officers ever left the truck stop — deviated unreasonably from standard police tactics in crisis situations and inexorably led to Katherine's death. *Cf. United States v. Curzi*, 867 F.2d 36, 43

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[4]Reserve Officer Giroux and Sergeant Crawford, who played no direct role in the forcible entry and were responding to orders, claim entitlement to qualified immunity by reason of their "lesser" participation. Given our holding, we need not address their claim.

n.6 (lst Cir. 1989) (police may not manipulate events to create an "exigency" justifying warrantless entry).

William McClaran, plaintiff's expert, testified that the defendant officers deviated in two fundamental respects from standard police practice in a crisis. First, they failed to define their exact "chain of command" before setting out to effect Katherine's arrest. Consequently, each officer at the scene was left to determine his own movements on an *ad hoc* basis ("free-lancing"), without adequate coordination among them.[5] Second, the officers eschewed accepted rules of "containment" by needlessly placing themselves in peril against the "paper thin" outer walls of the cabin. Plaintiff opines that upon approaching the cabin, the officers harbored a reasonable belief that Katherine was inside, given the music blaring from within the cabin and the presence of her truck in the cabin clearing. Consequently, and since the officers knew Katherine was armed and appeared to be acting irrationally, two officers should have taken concealed positions at the edge of the woods surrounding the cabin clearing, thereby cutting off any attempted escape. Thereafter, from a safer distance, other officers could have begun the effort to coax Katherine to come outside, while another officer returned to the police cruisers and radioed for assistance from the Maine State Tactical Team.

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[5]McClaran pointed to several instances of "freelancing" at the Hegarty cabin. First, although Officer Giroux alone had been charged with initiating communications with Katherine, Sergeant Hines unilaterally deviated from the arrangement by banging on the cabin door. Second, the failure to coordinate their movements before arriving at the scene created the risk that the officers might be caught in their own cross-fire. Third, the officers gave Katherine confusingly different explanations for their presence at the cabin. Finally, the officers agreed that should a forcible entry become necessary, Sergeant Hines would enter first, whereas in fact a subordinate officer (Guay) ended up giving the irrepealable signal to launch the forcible entry.

We must isolate all reasonably reliable information collectively known to the officers at the time their challenged conduct occurred, *without indulging hindsight*, *see Hunter*, 502 U.S. at 227, to determine whether an "objectively reasonable officer," with the identical information, *could* have concluded that there were exigent circumstances sufficient to support an immediate forcible entry of the Hegarty cabin to effect Katherine's warrantless arrest. *See Graham v. Connor*, 490 U.S. 386, 396 (1989). Any genuine *dispute* as to what the officers *knew or did* must be resolved in the plaintiff's favor. *See Fonte v. Collins*, 898 F.2d 284, 285 (lst Cir. 1990). Even then, however, summary judgment for the defendant officers would be appropriate if any such factual dispute were immaterial as a matter of law; that is, if it would not alter the required analysis as to the "legal reasonableness" of their conduct. *See, e.g., Prokey v. Watkins*, 942 F.2d 67, 73 (lst Cir. 1991) (citing cases in which material factual disputes precluded summary judgment on qualified immunity claim); *see also Cameron v. Seitz*, 38 F.3d 264, 273 n. 2 (6th Cir. 1994) (same).[6]

Following a careful examination of the applicable law and all competent evidence presented to the district court at summary judgment, we conclude that the benchmark against which plaintiff would have us evaluate the challenged police conduct is impermissibly stringent for the qualified immunity context, since it fails to acknowledge an overarching reality confronting the

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[6]We need to note the obvious as well. Even though the isolation of the Hegarty cabin and the death of Katherine Hegarty dictate that virtually all relevant evidence derives exclusively from the officers at the scene, *see Scott v. Henrich*, 39 F.3d 912, 915 (9th Cir. 1994) ("the officer defendant is often the only surviving eyewitness" in qualified immunity cases), summary judgment nonetheless must be granted absent a genuine dispute as to a material issue. *See Jirau-Bernal*, 37 F.3d at 3.

officers at the most critical moment of decision; viz., until Sergeant Crawford saw Katherine Hegarty through the bedroom window of the cabin, *there was no conclusive evidence that their suspect had been located or contained at all.*

The officers initially devised a "plan" which they characterized as "locate, identify, contain, negotiate, and arrest." Obviously, "location" and "identification" would be imperative *before* any other element in their plan could proceed. The officers knew that Katherine had fired approximately thirty rounds toward the campers earlier in the evening. And, in addition to their collective knowledge of her erratic, unlawful behavior in the recent past, the officers had learned from the campers that Katherine was last seen *driving her truck.* A competent police officer in these circumstances — possessed of this disturbing information — certainly could harbor an objectively reasonable concern that Katherine might yet remain *mobile*, thereby posing a continuing danger to other persons *in the vicinity.*

Several other campsites in the vicinity of the Hegarty cabin were occupied, and without knowing the precise motivation for Katherine's unprovoked, armed response to the peaceable presence of the four campers earlier in the evening, an objectively reasonable officer prudently could presume that other campers might be at similar risk. In fact, their use of the police dog while proceeding along the woods road toward the cabin attests to the officers' alertness to the possibility that Katherine could be lying in wait in the woods. Deciding not to take the risk attendant upon the delay necessarily entailed in obtaining a warrant, the officers accordingly placed top priority on *conclusively locating* their suspect at the earliest possible time so as to minimize the threat posed to the safety of other campers. *See Olson*, 495 U.S. at 100 (exigent circumstances

include the need to safeguard against threats to life or safety of others); *Almonte*, 952 F.2d at 22.[7]

Quite contrary to the major premise for William McClaran's expert opinion, by the time they arrived at the Hegarty cabin the officers had received decidedly *mixed* signals concerning their suspect's location. The parked truck suggested that Katherine might be inside the cabin, but the lack of artificial illumination suggested otherwise. The blaring music did not conclusively disprove either hypothesis. Nor had Katherine been seen or heard entering or moving about inside the cabin. Thus, it was in no sense improbable that Katherine, a licensed guide and experienced hunter, had left her vehicle and departed the cabin site on foot.

Nor was the alternative police strategy posited by Mr. McClaran without its shortcomings. Of course, had the officers chosen to cordon off the cabin from a "safe" distance, and begun calling out to Katherine in the hope they might negotiate her surrender — *and had she responded* — the "containment" phase could have proceeded apace. On the other hand, had she simply failed to respond — either because she could not hear their calls above the blaring music, or because she had fully expected them to investigate the campers' allegations and wanted to keep them off guard — the officers still would be left to speculate whether she was in the cabin.

Since time was of the essence, and it was imperative that they locate and identify their suspect so as to rule out the

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[7]The exigency created by the realistic danger the unlocated suspect posed to other campers in the vicinity likewise substantially mitigated an aggravating factor noted by the district court: the fact that the warrantless entry took place at night.

continuing danger she could pose to others in the vicinity, the officers then would have faced an irreconcilable quandary. They could undertake a "containment" strategy along the lines propounded by McClaran, which would necessitate a delay of several hours for the Maine State Tactical Team to reach the cabin, thereby countenancing the realistic risk that their suspect might be elsewhere at that very moment jeopardizing the safety of others.[8] Or, having heralded their arrival, the officers could have attempted to confirm Katherine's presence through visual contact, by approaching the outer walls of the darkened cabin across the moonlit clearing, thereby exposing themselves to gunfire from their armed and unpredictable suspect — by then forewarned and concealed.

Law enforcement officers quite often are required to assess just such probabilities, and to weigh the attendant contingencies. And it is precisely such spontaneous judgment calls — borne of necessity in rapidly evolving, life-endangering circumstances — that the qualified immunity doctrine was designed to insulate from judicial second-guessing in civil actions for money damages, unless the challenged conduct was clearly incompetent or undertaken in plain violation of established law. *See Hunter*, 502 U.S. at 229; *Anderson*, 483 U.S. at 638.

Thus, we do not determine which of these strategies represented the *more* prudent course or posed the *least* serious risk to the suspect, the officers or others in the vicinity. *See Scott v. Henrich*, 39 F.3d 912, 915 (9th Cir. 1994) (noting that "[o]fficers need not avail themselves of *the least intrusive means*

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[8]Once the tactical team had arrived, moreover, it would still have been necessary to confirm — by some means — Katherine's presence in the cabin.

of responding to an exigent situation; they need only act within that range of conduct [which is] . . . . reasonable"; contrary rule "would inevitably induce tentativeness by officers"). Rather, we consider only whether a competent police officer in these circumstances reasonably could have opted for an unannounced approach to the cabin walls forthwith.

As we conclude that a competent police officer reasonably could have believed that exigent circumstances warranted approaching the cabin walls — *forthwith and unannounced* — we turn to the remaining question: whether the defendant officers — once committed, and assured that Katherine was inside the cabin where she no longer posed a viable threat to other campers — reasonably could have believed that she represented an imminent physical threat to their own safety.[9] *See Olson*, 495 U.S. at 100.

The expert testimony on which plaintiff relies makes much of the notion that the entire plan for approaching the outer cabin walls was ill-conceived and uncoordinated *ab initio*, whereas the officers plausibly contend that they had worked together as a team so often in the past that their basic plan and tactics were implicitly understood. But even accepting William McClaran's prescription as to an appropriate police procedure for use in these circumstances, plaintiff does not explain how a differently formulated plan — devoid of the suggested deficiencies in the officers' plan — inevitably would have

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[9]Although we need not resolve the matter definitively, we have serious reservations whether the officers' actions were justified by concern that Katherine might take her own life. True, the objective evidence indicated that she had exhibited behavior both violent and unpredictable, yet the evidence revealed that her conduct was directed at third parties, never herself. Nor had she said anything to the officers that might indicate suicidal intent.

averted the exigency ultimately confronting them. *See supra* notes 5 & 8. Indeed, none of the consequences McClaran attributed to the alleged absence of a "chain of command," or to lack of coordination in the officers' plan, clearly constituted a *causative* factor in Katherine's death.[10] Rather, the causative exigency derived primarily from three factors over which the officers never had exclusive control: the need to ascertain Katherine's precise location as soon as possible, her unpredictable behavior, and the lack of protective cover for their own movements in locating and containing her.

Second, though plaintiff argues that the officers delayed their forcible entry until *they* were safest — when it "appeared" to Officer Guay that Katherine was unarmed and beyond arm's reach from a firearm — surely this argument exaggerates their on-the-spot sense of personal security by failing to assess the imminence of a perceived danger in light of the *totality of the circumstances*. *See United States v. Veillette*, 778 F.2d 899, 902 (lst Cir. 1985) (exigency is assessed by viewing "totality" of circumstances), *cert. denied*, 476 U.S. 1115 (1986).

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[10]Plaintiff misfocuses the "qualified immunity" analysis by inquiring whether *all aspects* of the officers' conduct were executed in the manner to be expected of an "objectively reasonable" officer, rather than whether the *particular decisions which led to Katherine's death* reasonably could have been made by such an officer. Thus, for example, even assuming the plan increased the risk that an officer might be caught in another officer's crossfire, the subsequent decision to enter and disarm Katherine was not implicated thereby. Furthermore, the officers' "differing" responses to Katherine's inquiries were not so much confusingly inconsistent, as consistently misleading. But their responses were also deliberately designed to reduce the risk that she might react violently, as by their consistent expressions of concern for Katherine's safety and their scrupulous avoidance of any mention of her impending arrest.

Katherine moved freely about the unilluminated interior of the locked cabin, which contained deadly firearms whose exact number and location were unknown to the officers. *Cf., e.g., United States v. Smith*, 797 F.2d 836, 841-42 (10th Cir. 1986) (exigency established for warrantless entry where agents approached aircraft with probable cause to believe it might harbor armed drug dealers); *United States v. Guarente*, 810 F. Supp. 350, 352-53 (D. Me. 1993) (exigency established for warrantless entry where officers remained uncertain about the intentions of armed suspects who might remain inside structure). Only minutes before, Katherine had pointed her rifle at Sergeant Crawford. *Cf. O'Brien v. City of Grand Rapids*, 23 F.3d 990, 997 (6th Cir. 1994) (qualified immunity claim disallowed where suspect "had taken no action against the officers" and "did not point the gun at anyone; noting that threat to police must be "immediate").[11] Prior to their forced entry, the officers realized

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[11]Although plaintiff argues that this incident cannot serve to establish an exigent circumstance — because Katherine may have pointed the gun at Crawford *before* she recognized that he was a police officer — omniscience is not the presumed mindset with which an objectively reasonable police officer approaches life endangering decisions. The correct focus must be on the significance an objectively reasonable police officer might attach to the threatening action, in circumstances where he — like Sergeant Crawford — could not *know*, with assurance, the suspect's exact state of mind or intent. *Cf., e.g., Gibson v. Officer*, P.A., 44 F.3d 274, 277-78 (5th Cir. 1995) (proper focus is not upon factual dispute as to whether suspect was intoxicated, but whether objective facts might lead a reasonable officer so to conclude); *Slattery v. Rizzo*, 939 F.2d 213, 216 (4th Cir. 1991) (police officer's belief that suspect was reaching for gun was "reasonable" even though object turned out to be a bottle).

that the cabin walls were "paper thin,"[12] thus affording insufficient cover should Katherine decide to fire from inside the cabin — a serious contingency that competent officers reasonably could take into account given the violent, irrational and unpredictable behavior recently exhibited by their barricaded suspect, including her peculiar bouts of laughter, history of emotional instability and demonstrated antagonism toward law enforcement personnel. In such circumstances, competent police officers reasonably could conclude that to announce their intention to place the barricaded suspect under arrest — dispensing with their ruse that they were there only to help her —might well spark renewed violence.

Finally, once their objectively reasonable locate-and-contain strategy had positioned several officers in unexpectedly vulnerable positions against the thin cabin walls, *cf. Curzi*, 867 F.2d at 43, they could neither remain in their positions indefinitely nor safely terminate the impasse by attempting to retreat across the moonlit cabin clearing without directly exposing themselves to potential gunfire. Thus, safe and indefinite containment — either from their vulnerable positions against the containment cabin walls or from a "safer" distance — no longer remained a practicable alternative. *Cf. United States v. Wilson*, 36 F.3d 205, 210 (lst Cir. 1994) (upholding denial of motion to suppress evidence because police officers should not be required to remain indefinitely outside apartment located in building which was well-known site of prior drug sales and police shootings); *Guarente*, 81C F. Supp. at 352-53 (finding it reasonable for police to enter building in circumstances where their alternative was to remain potential targets for any

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[12]Their vulnerability to gunfire from within the cabin was later confirmed. McClaran himself noted that several police bullets — fired immediately after the forcible entry — passed *through* the cabin walls.

concealed armed suspect who might be inside); *cf. also United States v. Hardy*, ___ F.3d ___, ___ (7th Cir. 1995) [No. 94-2820, 1995 U.S. App. LEXIS 7605 (7th Cir. Apr. 5, 1995)] (finding exigent threat to officer safety where armed suspect, with known history of violence and drug use, was inside locked motel room and within "easy reach" of powerful firearm); *Russo v. City of Cincinnati*, 953 F.2d 1036, 1044-45 (6th Cir. 1992) (finding that no unreasonably excessive force had been used against an armed and "suicidal" person — barricaded inside apartment — who had made threatening statements toward police officers while in intermittent close proximity to them, and showed signs of serious mental instability), *Smith*, 797 F.2d at 841 (exigency established where officers had probable cause to believe aircraft, which had landed at isolated airfield after dark, might harbor armed drug dealers).

We therefore conclude that a competent police officer — possessing the same information the defendant officers had on May 15, 1992 — reasonably could have believed both that there existed probable cause to arrest Katherine Hegarty and exigent circumstances justifying their immediate warrantless entry. Consequently, the summary judgment order entered by the district court must be vacated, and summary judgment must be entered for the defendant officers.

B. *Sheriff Havey's Qualified Immunity Claim*

Although Somerset County Sheriff Spencer Havey did not participate in the events of May 15, 1992, plaintiff advances two related challenges to the summary judgment order entered in favor of Havey. First, plaintiff argues that Havey failed to train his officers adequately or to institute written standard operating procedures ("SOPs"), even though it was reasonably foreseeable that these deputy sheriffs likely would encounter so-called

"barricaded felon" cases on a frequent basis in rural, wooded Somerset County. Second, even assuming that a need for additional training and SOPs had not been foreseeable prior to the Hegarty incident, Sheriff Havey's *subsequent* conduct would enable a factfinder to infer that Havey had condoned the officers' conduct, or been indifferent to the need for better training long before May 15, 1992. For example, Sheriff Havey refused to discipline his officers for the fatal shooting of Katherine Hegarty, as recommended in the Attorney General's final investigative report. Nor did he institute additional training, as recommended by a citizen review board convened by Havey in the wake of the tragic event.

1. *Applicable Law*

Under 28 U.S.C. 1983, supervisory law enforcement officers incur no *respondeat superior* liability for the actions of their subordinates. *See, e.g., City of Canton v. Harris*, 489 U.S. 378, 385 (1989). Absent participation in the challenged conduct, a supervisor "can be held liable . . . [only] if (1) the behavior of [his] subordinates results in a constitutional violation and (2) the [supervisor's] action or inaction was *'affirmative[ly] link[ed]'* to the behavior in the sense that it could be characterized as 'supervisory encouragement, condonation or acquiescence' or 'gross negligence [of the supervisor] amounting to *deliberate indifference*.'" *Lipsett v. University of Puerto Rico*, 864 F.2d 881, 902-03 (lst Cir. 1988) (emphasis added) (citations omitted); *see Rodrigues v. Furtado*, 950 F.2d 805, 813 (lst Cir. 1991) (discussing deliberate indifference to officer training). Deliberate indifference will be found only if "it would be manifest to any reasonable official that his conduct was very likely to violate an individual's constitutional rights." *Febus-Rodriguez*, 14 F.3d at 92 (quoting *Germany v. Vance*, 868 F.2d 9, 18 (lst Cir. 1989)). The "affirmative link"

requirement contemplates proof that the supervisor's conduct led inexorably to the constitutional violation. *See id.*; *see also Fraire v. City of Arlington*, 957 F.2d 1268, 1281 (5th Cir.), *cert. denied*, 113 S. Ct. 462 (1992).

2. *Application of Law to Facts*

The determination that a subordinate law enforcement officer is entitled to qualified immunity from suit under section 1983 is not necessarily dispositive of the supervisor's immunity claim. Nevertheless, it does increase the weight of the burden plaintiff must bear in demonstrating not only a deficiency in supervision but also the essential *causal connection* or "affirmative linkage" between any such deficiency in supervision and the alleged deprivation of rights. We conclude that plaintiff has not carried this heavy burden.

We find the district court's preliminary analysis of Sheriff Havey's qualified immunity claim to be well reasoned and persuasive. The evidence demonstrates that Sheriff Havey, newly elected to office, had no notice that the deputy sheriffs were experiencing problems in dealing with "barricaded suspect" confrontations prior to the incident in question. *Cf. Febus-Rodriguez*, 14 F.3d at 92. Indeed, their police academy training and instruction time relating to warrantless entries *exceeded* the national average. *See Canton*, 489 U.S. at 389. Moreover, rather than simply ignore the Hegarty incident, Havey suspended all officers involved and convened a panel to investigate and make recommendations. Although it is entirely understandable that plaintiff would fault Sheriff Havey for not accepting or adopting the recommendations made by the advisory panel, such a decision is insufficient, standing alone, to establish deliberate indifference. *See, e.g., Santiago v. Fenton*, 891 F.2d 373, 382 (lst Cir. 1989) (decision not to

discipline or fault subordinates' conduct, following investigation, is insufficient, standing alone, to demonstrate supervisor's "deliberate indifference"); *see also Fraire*, 957 F.2d at 1278-79.

Even though the district court ruled that Havey's subsequent conduct did not amount to deliberate indifference, it expressed serious reservations concerning some of his conduct, *see Bordanaro v. McLeod*, 871 F.2d 1151, 1166-67 (lst Cir.), *cert. denied*, 493 U.S. 820 (1989) (postincident conduct may be relevant to "deliberate indifference" inquiry); *Grandstaff v. City of Borger*, 767 F.2d 161, 171 (5th Cir. 1985), *cert. denied*, 480 U.S. 916 (1987) (same), notably Havey's failure to acknowledge the need to *prescribe* SOPs or to institute in-house training for handling "barricaded felon" cases. Nevertheless, the rationale for our decision that the individual officers at the scene acted within the bounds of objective reasonableness, *see supra* Section II.A, plainly undermines most of the district court's concerns.

Most importantly, plaintiff failed to demonstrate the required "'affirmative link" between Havey's conduct and Katherine Hegarty's death. That is, he has not sustained the burden of establishing that any lack of "barricaded felon" training on the part of the Somerset County Sheriff's Department officers at the scene caused Katherine's death. *Cf., e.g., Manarite v. City of Springfield*, 957 F.2d 953, 958 (lst Cir.), *cert. denied*, 113 S. Ct. 113 (1992). First, even the plaintiff's expert declined to characterize the Hegarty incident as a *typical* "barricaded felon" case. And, unlike the typical "barricaded felon" case, these officers at the outset had no conclusive evidence but that their suspect *remained at large*.

Moreover, even assuming the best efforts of the most prescient supervisor, it simply is not possible to anticipate the

entire array of atypical circumstances — upon which sensitive *discretionary* judgment calls must be made by the officer in the field — for inclusion in a law enforcement agency's standard operating procedures. For example, even indulging an impermissible measure of hindsight, we do not believe that SOPs, however elaborate, would have enabled the defendant officers at the scene to resolve by *safer or more reliable means* whether Katherine was inside the cabin at the time the officers first arrived. So, too, in the end, Sheriff Havey — after initiating an immediate investigation into the officers' actions — formed the professional opinion, rightly or wrongly, that the judgment calls made at the scene were reasonable.

Finally, though plaintiff would characterize Sheriff Havey's subsequent conduct as pure obstinacy, *the cloak of qualified immunity nonetheless remains in place* unless "it would be manifest to any reasonable official" in the supervisor's position that the failure to establish such a policy or to institute in-house training *prior to the Hegarty incident* "was very likely to violate an individual's constitutional rights." *Febus-Rodriguez*, 14 F.3d at 92. As plaintiff failed even to approach the threshold for such a showing, we affirm the district court ruling allowing the qualified immunity claim asserted by defendant Havey.

III
CONCLUSION

We cannot know whether the tragic death of Katherine Hegarty would have been averted but for the judgment calls made by the defendant officers at the scene, nor is that the inquiry we make in a civil rights action for damages against the individual officers. We determine only whether the discretionary decisions made by the defendants were within the

broad range of reasonable conduct to be expected from competent police officers and their supervisors in like circumstances. As the actions of the defendant officers and their supervisor plainly met the latter standard, the district court order denying summary judgment to the defendant officers must be reversed and the judgment in favor of defendant Havey must be affirmed.

The judgment for defendant Havey is affirmed and the case is remanded to the district court with instructions to vacate the judgment entered for plaintiff and enter summary judgment for the defendant officers, and for such further proceedings as may be appropriate and consistent with this opinion. The parties shall bear their own costs on appeal.

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

Civ. No. 93-0004B

JOHN M. HEGARTY, as
Personal Representative of the
Estate of KATHERINE A. HEGARTY,
and Individually,
Plaintiff,
v.
SOMERSET COUNTY, JOHN R. ATWOOD, ANDREW E. DEMERS, JR., SPENCER HAVEY, GARY WRIGHT, RENE GUAY, WILFRED HINES, THOMAS GIROUX, JR., and WILLIAM CRAWFORD, JR.,
Defendants.

ORDER AND MEMORANDUM OF DECISION

BRODY, District Judge.

Shortly after midnight on May 16, 1992, Katherine Hegarty was shot and killed in her home by police officers attempting to execute a warrantless entry and arrest. Her husband, John Hegarty, both individually and on behalf of his wife's estate, brings this action against the officers involved in the incident, county and state supervisory personnel, and Somerset County. He claims, pursuant to 42 U.S.C. § 1983, that Defendants deprived him and his wife of their rights under the Fourth and Fourteenth Amendments of the United States Constitution. He also brings a number of pendant state claims under the Maine Civil Rights Act, 5 M.R.S.A. §§ 4681-4685

(Supp. 1993), and the Maine Tort Claims Act, 14 M.R.S.A. §§ 8101-8118 (1980 & Supp. 1993).

Defendants move for summary judgment on all counts.[1] They assert that they are entitled to summary judgment on Plaintiff's claims under § 1983 and the Maine Civil Rights Act because of qualified immunity. They further contend that discretionary immunity bars Plaintiff's recovery on his state claims.

The Court finds that Defendants Atwood, Demers, Havey, and Somerset County are immune from suit on Plaintiff's § 1983 and Maine Civil Rights Act claims on the basis of qualified immunity; but that Defendants Wright, Guay, Hines, Crawford, and Giroux are not. The Court also finds that all Defendants except Somerset County are immune from suit on Plaintiff's state tort claims on the basis of discretionary immunity.

I. Standard

On a motion for summary judgment, the Court "reads the record and indulge[s] in all inferences in a light most favorable to the nonmoving party." *Levy v. FDIC*, 7 F.3d 1054, 1056 (lst Cir. 1993) (quoting *Rivera-Ruiz v. Gonzalez-Rivera*, 983 F.2d

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[1]Defendants Atwood and Demers move to dismiss Plaintiff's state claims pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief could be granted. Because Defendants presented materials outside the pleadings, the Court treats this motion as one for summary judgment. *See* Fed. R. Civ. P. 12(b) ("If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56. . .").

332, 333-34 (lst Cir. 1993)). To succeed on a motion for summary judgment, "the moving party must show that there is an absence of evidence to support the nonmoving party's position." *Febus Rodriguez v. Betancourt-Lebron*, No. 93-1499, slip op. at 6 (lst Cir. Jan. 18, 1994). If the moving party accomplishes this, the burden shifts to the nonmoving party to show that there is an issue of fact that could affect the outcome of the litigation and from which a reasonable jury could find for the nonmoving party. *Id.*

II. Facts

The facts when viewed in the light most favorable to the nonmoving party, Plaintiff, are as follows: John and Katherine Hegarty were residents of the Jackman, Maine area since 1973. (Hegarty Aff. ¶ 3.) Katherine Hegarty was a Registered Maine Guide, (Hegarty Aff. ¶ 4), and was known for her marksmanship (Giroux Aff. ¶ 11). The couple owned a cabin in the Jackman area that was located on a dirt road about three miles from the nearest paved road, Route 201. (Giroux Dep. at 53-54.) About a mile and a half toward Route 201 from the Hegarty cabin there was a cable strung between two pillars, barring passage onto the road. (Hegarty Aff. ¶ 13.)

On the morning of May 15, 1992, four campers let themselves through the gate and proceeded to an area near the Hegarty cabin. (Pl.'s Ex. C9 at 1.) They set up a campsite roughly 75 yards from the cabin. (Pl.'s Ex. C8 at 1.) The campers left to go fishing and returned to the campsite at about 8:00 p.m. (Pl.'s Ex. C9 at 1.) They noticed Katherine Hegarty's truck near the cabin and saw her doing yard work. (Pl.'s Ex. C8 at 3.) Hegarty did not speak to the campers at that time. *(Id.)* Sometime around 9:00 p.m., Hegarty confronted the campers asking who gave them the key for the gate. (Pl.'s

Ex. C9 at 1.) The campers believed Hegarty was either intoxicated or mentally unstable. (*Id.*) Hegarty told the campers, among other things, "this is my house and you're invading my privacy." (Pl.'s Ex. C8 at 4.)

After another verbal exchange, the campers told Hegarty that they would leave in the morning. (*Id.*) Hegarty responded, "[o]nly if you make it 'til the morning." (Pl.'s Ex. C10 at 3.) Hegarty went into the cabin and retrieved a gun, and then, from her porch, fired a number of shots in the air in the vicinity of the campers.[2] Hegarty went back into the cabin a number of times; the campers believed that she was reloading her gun.[3] (Pl.'s Ex. C8 at 5.) One of the campers asked Hegarty if they could leave, and Hegarty responded that she would follow them to see how they got through the gate. (Pl.'s Ex. C8 at 6.) During one of Hegarty's trips into her cabin, the campers got into their truck and drove away quickly. (Pl.'s EX. C10 at 4.) As the campers passed Hegarty's cabin, they saw her come out with a gun but they are unsure whether she fired any shots. (*Id.*) The campers believed that Hegarty followed them part way down the dirt road. (*Id.*)

The campers went to a truck stop located four or five miles from the Hegarty cabin and contacted the police. (Pl.'s

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[2]The record is not clear how close the bullets came to the campers. (Pl.'s Ex. C10 at 3 (10 or 15 feet above their heads) and Pl.'s Ex. C8 at 5 (gun was pointed in general direction of campers but they could not hear bullets whistling nearby)). Nor is it clear whether Hegarty was actually aiming at them. (Pl.'s Ex. C8 at 5-6 ("I think she was trying . . . to scare us. . . . I don't believe it was aimed directly at us") and Pl.'s Ex. Cll at 3 ("I don't know if she was trying to hit us or not, I have no idea.").)

[3]It is not clear how many shots Hegarty fired but the campers estimated about thirty shots. (Pl.'s Ex. C9 at 1.)

Ex. Cll at 4.) Reserve Deputy Giroux was the first officer to respond. (Giroux Dep. at 22.) From the description provided by the campers, Giroux concluded that Hegarty was the person shooting. (*Id.* at 21.)

Giroux was joined by Deputy Guay, Sergeant Hines, and State Trooper Wright. (Giroux Dep. at 46.) The officers collectively decided to arrest Hegarty.[4] They planned to try to persuade Hegarty to come out of the house but if that failed and they were successful in separating Hegarty from her firearm, they planned to enter the cabin. (Giroux Dep. at 55-59.) Wright warned the others "just because she's a woman, if things go bad, don't hesitate." (Wright Dep. at 124.) The four officers then left the truck stop and met Deputy Crawford at the intersection of Route 201 and the dirt road leading to the Hegarty cabin. (Giroux Dep. at 55.) The officers briefed Crawford about the situation and their plan of action. (*Id.*)

The officers then proceeded along the dirt road toward the Hegarty cabin. They parked their vehicles about seven-tenths of a mile from the cabin and walked the rest of the way into the area surrounding the cabin. (Giroux Dep. at 60.) When they arrived at the cabin, the officers heard music playing

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[4]Several of the officers had concerns about Hegarty's mental and emotional condition. Giroux's concerns were based on an incident in which Hegarty had to be sedated. (Giroux Dep. at 33-35.) Wright had arrested Hegarty the previous year for operating under the influence and the two became involved in a dispute at that time. (Crawford Aff. ¶ 11.) Wright told all of the other officers involved about the dispute. (*Id.*) The details about the confrontation between Hegarty and Wright are contested but both Guay and Wright state that Hegarty was very intoxicated and was behaving irrationally at that time. (Guay Dep. at 91.) Plaintiff asserts that Wright and Guay treated Hegarty roughly during the OUI arrest, and, as a result, Hegarty filed an eight-page complaint against Wright. (Hegarty Aff. ¶ 7-8.)

inside the cabin. (Wright Dep. at 166.) Giroux began yelling to Hegarty, identifying himself and telling her that they wanted to speak with her. (Giroux Dep. at 76, 79-80.) Hegarty did not respond. *Id.* Hines also identified himself and rapped on the cabin door with his flashlight, also to no avail. (Hines Dep. at 145.)

After a few moments, Crawford shined his flashlight into Hegarty's bedroom where she appeared to have been lying down. (Crawford Dep. 121-22). Hegarty had a rifle on her bed and she pointed it toward Crawford. (*Id.*) Hegarty turned the volume down on her radio and asked who was at her window. (*Id.* at 123.) Crawford identified himself. (*Id.*)

Giroux then yelled again and Hegarty responded by asking what his intentions were. (Guay Dep. at 118.) Rather than telling Hegarty that she was the suspect of their investigation or that they intended to arrest her, Guay told Hegarty that they were investigating burglaries in the area and wanted to talk to her about them. (Guay Aff. ¶ 20.) Hegarty then repeatedly asked the officers what they wanted and asked them to leave her property. (Guay Dep. at 118-19.) During the conversation with Hegarty, the officers noticed that Hegarty appeared to be intoxicated or mentally unstable. (Guay Dep. at 122, Hines Dep. at 165-66.) The officers again asked Hegarty to come out of the cabin but she refused.

About this time, Hegarty moved from her bedroom to the front of the cabin. She knelt on her couch with her hands on the back of the couch looking out the window. (Guay Dep at 120-21.) She no longer appeared to be armed. (*Id.* at 123.) Officer Guay, seeing that Hegarty was not armed at the time, told Hines "she doesn't have a gun, go." (Guay Aff. ¶ 24.) Hines then pulled open the screen door and repeatedly kicked in

the front door which was locked with a chain. (Hines Aff. ¶ 57.) Just as Hines entered the cabin, he heard Guay yell, "She's got a gun. Don't go." (*Id.* ¶ 59.) Once Hines was inside, Hegarty started to point her rifle at him. (*Id.*) Guay and Wright yelled to Hegarty to put down her gun. (Hines Dep at 176-77.) When she did not do so, Hines, Wright, and Guay shot her. (*Id.* at 177). The shots were fatal.[5]

III. § 1983

A. Qualified Immunity

All Defendants claim that they are entitled to qualified immunity. The standard for qualified immunity is that "government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Fonte v. Collins*, 898 F.2d 284, 285 (lst Cir. 1990) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). Because the factual and legal issues differ somewhat among Defendants, the Court will examine them in three groups: the individual officers who were at the scene, their supervisors, and Somerset County.

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[5]The amount of time that elapsed between when the officers arrived on the scene and when Hegarty was shot is disputed with estimates ranging from about ten minutes to nearly a half hour. (Parsons Dep. at 225.)

1. *The Individual Officers*[6]

The relevant inquiry in determining whether Officers Giroux, Guay, Wright, Crawford, and Hines are entitled to qualified immunity is "whether, given the facts in the light most favorable to the plaintiff, the police officers have established as a matter of law, that it was reasonable for them to believe that their conduct did not violate [the plaintiff's] constitutional rights."[7] *Fonte*, 898 F.2d at 285-86.

In order to enter a home for the purpose of making an arrest, police first must have grounds to arrest the person they are seeking. In other words, police must have probable cause to believe that the person being sought has committed an offense. *Wong Sun v. United States*, 371 U.S. 471, 479-80 (1963). For the purposes of this Motion, the Court will assume, without deciding, that probable cause existed to believe that Hegarty committed the offenses of criminal threatening, 17-A

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[6]The Court treats the five participating officers together despite the fact that Giroux and Crawford did not actually fire shots at Hegarty. All of the officers fully participated in the warrantless entry and thus proximately caused Hegarty's injuries. *See Gutierrez-Rodriguez v. Cartagena*, 882 F.2d 553, 560 (lst Cir. 1989) (person proximately causes or subjects another to a constitutional deprivation if he "does an affirmative act, participates in another's affirmative acts, or omits to perform an affirmative act which he is legally required to do, that causes the deprivation of which complaint is made.") (quoting *Springer v. Seaman*, 821 F.2d 871, 879 (lst Cir. 1987)).

[7]Some of the events of the evening of May 16, 1992 are disputed. When considering a claim of qualified immunity, however, a court may rely on the facts as asserted by the plaintiff. *Mitchell v. Forsyth*, 472 U.S. 511, 527 (1985).

M.R.S.A. § 209(1) (1983)[8], and reckless conduct with a firearm, 17-A M.R.S.A. § 211(1) (1983)[9].

Even if probable cause to arrest the suspect exists, police may not enter that suspect's home without a warrant absent consent or exigent circumstances requiring such an entry. *Minnesota v. Olson*, 495 U.S. 91, 100 (1990). "The test for whether exigent circumstances exist is 'whether there is such a compelling necessity for immediate action as will not brook the delay of obtaining a warrant.'" *United States v. Guarente*, 810 F. Supp. 350, 352 (D. Me. 1993) (quoting *United States v. Almonte*, 952 F.2d 20, 22 (lst Cir. 1991)). Exigent circumstances include: "[the] hot pursuit of a fleeing felon, [the] imminent destruction of the evidence, . . . the need to prevent a suspect's escape, [and] the risk of danger to the police or to other persons inside or outside the dwelling." *Olson*, 495 U.S. at 100 (citations omitted). Other factors considered by federal courts to determine whether exigent circumstances exist include: the nature and gravity of the offense involved, whether police reasonably believed that the suspect was armed, whether there is strong reason to believe that the suspect is in the dwelling and committed the crime involved, the likelihood that the suspect will escape if not swiftly apprehended, whether the police entered forcibly without giving the suspect an opportunity to surrender, and whether the entry was made at night. *Dorman v. United States*, 435 F.2d 385, 392-93 (D.C.Cir. 1970); *but see*

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[8]17-A M.R.S.A. § 209(1) provides that "[a] person is guilty of criminal threatening if he intentionally or knowingly places another person in fear of imminent bodily injury."

[9]17-A M.R.S.A. § 211(1) provides that "[a] person is guilty of reckless conduct if he recklessly creates a substantial risk of serious bodily injury to another person."

United States v. Adams, 621 F.2d 41, 44 (lst Cir. 1980) (although *Dorman* factors are helpful they are not to be used as a pass/fail checklist for determining exigency).

Exigent circumstances did not exist in this case nor was it reasonable for the officers involved to believe that such circumstances existed. There was no hot pursuit of a fleeing felon. In fact, when the officers first arrived on the scene, Hegarty appears to have been sleeping. There was virtually no likelihood that Hegarty would escape if not swiftly apprehended. Just before the officers began the forcible entry, Hegarty was kneeling on her couch within the sight of the officers and speaking with the officers. There was no risk of destruction of any evidence.

The officers assert that they knew Hegarty was armed and therefore feared that Hegarty would injure them or herself. The Court is not persuaded, however, that such fears were reasonable under these facts. In fact, several officers have stated that, just prior to the entry, Hegarty posed no immediate danger to themselves or anyone else. (Guay Dep. at 124; Giroux Dep. at 96-97). Hegarty repeatedly asked the officers to leave, but she neither threatened them nor did she fire any shots while the officers were present. In fact, the officers decided to enter Hegarty's home forcibly only after it appeared that she had put down her rifle. Hegarty did not threaten injury to herself at any time, nor were there other individuals in danger. (Pl.'s Ex. C7 at 30.) *Cf. Guarente*, 810 F. Supp. at 352-53 (exigent circumstances existed when officers responding to a domestic dispute knew armed suspect was inside and others inside were possibly imperiled).

The entry itself was not peaceable but was made by breaking down the locked door to Hegarty's home. The Court

also finds it troubling that the forcible entry was made late at night when Hegarty had been sleeping only moments earlier. *See United States v. Blair*, 366 F.Supp. 1036, 1039 n.7 (S.D.N.Y. 1973) (entry at 8:00 p.m. had "none of the surprise, shock and extreme invasion of privacy which might accompany rousing a suspect from [her] bed to make an arrest").

Finally, the officers never notified Hegarty of their true purpose before the entry. Although the officers asked Hegarty to come out of her home, they never told her that she was under investigation or that they intended to arrest her. Further, Hegarty could have doubted their authority, particularly in her inebriated condition. The officers left their vehicles more than a half mile from the cabin, so that there were no emergency lights to clearly identify them as police officers. While several of the officers identified themselves to Hegarty, it is not clear that she was able to see them through the darkness and after the officers shined flashlights in her face at least some of this time. (Guay Dep. at 124.)

Based on the facts viewed in the light most favorable to Plaintiff, the officers could not reasonably have believed that their forcible intrusion into Hegarty's home was justified by exigent circumstances. The officers are therefore not entitled to qualified immunity and their Motion for Summary Judgment on Count I of Plaintiff's Complaint is DENIED.

2. *The Supervisory Personnel*

Plaintiff named a number of supervisory personnel in his § 1983 claim: John Atwood, Commissioner of the Maine Department of Public Safety; Andrew Demers, Jr., Chief of the Bureau of Maine State Police; and Spencer Havey, Sheriff of Somerset County. Plaintiff does not allege that these individuals

were personally involved in the shooting incident, but bases his claim on supervisory liability.

A supervisor may not be liable under a theory of *respondeat superior*. *Febus-Rodriguez*, No. 93-1499, slip op. at 8. A supervisor may be liable under § 1983, however, if his or her own conduct or inaction "amounted to reckless or callous indifference to the constitutional rights of others." *Gutierrez*, 882 F.2d at 562. "[R]eckless or callous indifference" has also been described as "deliberate indifference." *Id.* A plaintiff must also establish "an 'affirmative link' between the [subordinate's] misconduct and the action, or inaction of [the] supervisory officials" in order to establish liability under § 1983. *Id.* (quoting *Woodly v. Town of Nantucket*, 645 F. Supp. 1365, 1372 (D. Mass. 1986)).

a. Atwood and Demers

As Commissioner of the Maine Department of Public Safety and the Chief of the Maine State Police, Atwood and Demers bear ultimate responsibility for the training received by State Police Trooper Wright. Plaintiff contends that Atwood and Demers provided Wright with inadequate training in warrantless entries and the use of force in crisis situations. A failure to train may amount to deliberate indifference if a plaintiff can establish that "in light of the duties assigned to specific officers or employees the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policy-makers . . . can reasonably be said to have been deliberately indifferent to the need." *City of Canton v. Harris*, 489 U.S. 378, 390 (1989). If that failure to train actually causes injury, those responsible for training may be held liable under § 1983. *Id.*

The facts surrounding the training provided to the officers are not disputed. Wright received his initial training at the Maine State Police Academy. (Wright Dep. at 19.) The Academy requires state police officers to attend about 800 hours of training. (Demers Aff. ¶ 16.) At the Academy, Wright became familiar with the Maine State Police's policy on barricaded persons[10] and attended a one-day practical exercise on dealing with barricaded suspects. (Demers Dep. at 163.) During basic training, officers receive a copy of the Maine Law Enforcement Officer's Manual, that includes topics such as probable cause, entry of dwellings to effectuate arrest, and use of deadly force. (Harvey Aff. ¶ 10; Atwood & Demers' Ex. 168.) After the Academy, state police officers are also required to attend an eight-week field training program. (Demers Aff. ¶ 16.) Troopers also receive a quarterly educational newsletter containing information on police practice. (Harvey Aff. ¶ 14.) In addition to this basic training, Wright received training from the Basic Patrol Dog School in 1989 and 1992. (Reardon Aff. ¶ 28.) Each sixteen-week session of the Patrol Dog School

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[10]The Maine State Police's policy on barricaded persons, which was in place at the time of the Hegarty shooting, instructs officers that "by waiting the subject out, apprehension could possibly be made without danger or injury to the suspect or [the officer's] own personnel." That policy continues:

> If the suspect has acted in a manner that clearly indicates his intention to cause injury or death and when conditions suggest that such outcome is likely, positive action must be taken to eliminate this threat by the use of chemicals or firearms ... [but] [t]he employment of firearms should only occur after the suspect has fired upon or threatened to fire upon an innocent person or police officer.

(Pl.'s Ex. B7 at 2.)

included some training in search and seizure and the use of force. (*Id.* 1 27.)

Plaintiff's expert conceded that the number of hours of initial training required for Maine State Police exceeded the national average. (McClaran Dep. at 282.) Plaintiff's expert stated, however, that Atwood and Demers should have mandated at least eight hours of mandatory in-service training annually to teach a variety of topics including warrantless forcible entry, use of deadly force, multijurisdictional teams, tactical teams, barricaded persons, and constitutional rights. (*Id.* at 286-87.) Plaintiff further asserts that the fact that Wright knew of the official policy regarding barricaded persons but did not follow it during the Hegarty shooting resulted from the lack of in-service training.

Plaintiff has failed to show that Atwood and Demers were deliberately indifferent to Wright's training in the area of warrantless entries and use of force. Wright's training did not violate any legally mandated standard. *See Febus-Rodriguez*, No. 93-1499, slip op. at 10 (no liability where plaintiffs did not proffer any evidence that these specific practices violated a legally mandated standard). Plaintiff has offered no evidence showing that Atwood and Demers actually knew or should have known that there were any problems with their training program. *See id.* Plaintiff introduced no evidence to show that there were any previous problems with the training of Wright or any other state police officer. *See id.*

Plaintiff also asserts that the fact that Atwood and Demers did not discipline Wright after the Hegarty incident, despite the Attorney General's recommendation to do so, is evidence that they condoned Wright's conduct. A court may consider actions taken subsequent to an event to determine a policymaker's

disposition prior to that event. *See Grandstaff v. City of Borger*, 767 F.2d 161, 171 (5th Cir. 1985), *cert. denied*, 480 U.S. 916 (1987) ("subsequent acceptance of dangerous recklessness by policymaker tends to prove his preexisting disposition and policy"). While it would appear that Wright clearly should have been disciplined for his involvement in the Hegarty incident, the Court does not find this evidence adequate, by itself, to support a conclusion that Atwood and Demers were deliberately indifferent to Wright's training. Because Plaintiff has failed to establish that Atwood and Demers were deliberately indifferent to the constitutional rights of Maine citizens in the training provided to Wright, the Court holds that Atwood and Demers are entitled to qualified immunity. The Court, therefore, GRANTS Atwood and Demers' Motion for Summary Judgment as to Count I of Plaintiff's Complaint.

b. Sheriff Havey

As Sheriff of Somerset County, Defendant Havey directly supervised Officers Guay, Hines, Giroux, and Crawford. Plaintiff asserts that Havey was grossly negligent in the training and supervision of these officers and that this gross negligence rose to the level of deliberate indifference.

All of the Somerset County officers received training from the Maine Criminal Justice Academy. Guay and Crawford attended both the twelve-week basic police course as well as the 100-hour reserve training course at the Academy. (Guay Aff. ¶¶ 1-2, Crawford Aff. ¶ 3.) Giroux participated in the 100-hour reserve course only. (Giroux Aff. ¶ 5.) Hines attended the twelve-week basic police course and various unrelated courses at the Academy as well as the Ranger Academy. (Hines Aff. ¶ 2-4.) Both programs at the Academy included training in warrantless entries and dealing with armed suspects. (Crawford Aff. ¶ 3, Guay Aff. ¶ 2, Giroux Aff. ¶ 5.) In addition to the

training provided by the Academy, Havey also required his officers to attend biannual training sessions on firearms and the use of deadly force. (Havey Aff. at ¶ 12).

Plaintiff's expert acknowledges that the number of hours of initial training required for the Somerset County officers was above the national average. (McClaran Dep. at 282.) Plaintiff's primary complaint with the training provided by Havey is the lack of mandatory in-service training. As support for his position, Plaintiff points to the findings of the Administrative Review Board that Havey established to investigate the Hegarty shooting. That Board recommended that "[s]pecific training in the areas of barricaded felons, crisis negotiations, and persons with substance abuse and mental instability should be implemented." (Havey Dep. Ex. 6 at 8.) Plaintiff also points to a prepared press release in which Havey stated "[t]he shooting is a tragedy that could have been prevented with proper training . . . I agree that our officers are under trained . . . ." (*Id.* at 90, Ex. 7 at 3.) Havey later recanted this statement.[11]

It is not enough to show that an injury or accident "could have been avoided if an officer had had better or more training, sufficient to equip him to avoid the particular injury-causing conduct." *City of Canton*, 489 U.S. at 391. "Such a claim could be made about almost any encounter resulting in injury." *Id.* A failure to provide specific training is not actionable in this instance unless it is so callous or reckless that it amounts to deliberate indifference. Even a total lack of training is not necessarily a constitutional violation. *See Rodriquez v. Furtado*, 950 F.2d 805, 813 (lst Cir. 1991) (no official training or

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[11]In his deposition, Havey stated that this statement did not reflect his opinion at the time but rather was "politically motivated to receive more money in [his] training account." (Havey Dep. at 91.)

supervisory policy regarding body cavity searches did not result in 1983 liability for supervisors).

Although the training that Havey provided may have been shortsighted, it was not deliberately indifferent. There was no evidence that Havey knew of a weakness in the training provided to his officers or that such a need was "so obvious" and the "inadequacy so likely to result in the violation of constitutional rights" that his inaction was "deliberately indifferent to the need." *City of Canton*, 489 U.S. at 390; *see also Febus-Rodriquez*, No. 93-1499, slip op. at 10 (supervisor's training programs did not reflect a "conscious policy" to train his officers inadequately).

Plaintiff also asserts that Havey failed to adequately supervise the officers involved and thus created an atmosphere in which officers believed that reckless conduct would be condoned. Plaintiff argues that this indifference is demonstrated by the fact that prior to the shooting, Havey had instituted no standard operating procedure to deal with barricaded suspects, forcible entry, or warrantless entries, despite Havey's acknowledgment that such situations were not uncommon. (Havey Dep. at 154.)

Plaintiff also points to evidence of Havey's conduct after the shooting. He focusses, first, on Havey's hesitancy to implement standard policies even in light of the shooting,[12] and Havey's refusal to recognize the Hegarty incident as a

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[12] After the shooting, Havey convened a group of attorneys to assist him in drafting a barricaded person policy. Havey announced, in February 1993, that the draft would be implemented but as of October 1993 he had not yet done so. (Havey Dep. at 140-42.

barricaded suspect situation.[13] Plaintiff also points to Havey's decision not to discipline any of the officers involved, despite the recommendations of both the Attorney General and the Administrative Review Board to do so.

The Court does not condone Havey's failure readily appreciate the existence of a barricaded suspect situation and the need for a cogent policy to guide officers in such a situation even after the Hegarty shooting. *See Grandstaff*, 767 F.2d at 171 (jury was entitled to conclude, from the fact that episode of dangerous recklessness received so little attention and action by city policymakers, that such actions were "accepted as the way things are done and have been done" in the city). The Court also finds significant the fact that there were a number of officers under Havey's supervision involved in the shooting rather than a single officer acting alone. This suggests that the actions of these officers are more likely representative of the unwritten policy or custom of the county than the actions of a single officer. *Bordanaro v. McLeod*, 871 F.2d 1151, 1160 (lst Cir. 1989). Furthermore, given the recommendations of both the Attorney General and the Advisory Review Board established by Havey, the Court finds Havey's decision not to discipline the officers troublesome.

Despite serious concerns about Havey's supervisory abilities, however, the Court is not persuaded that Havey was deliberately indifferent to the constitutional rights of the citizens his officers are hired to protect. Plaintiff has not established that Havey had any advance notice that there was a problem with the

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[13]Havey stated that he did not believe that Hegarty was a barricaded person because her chained door was not a barricade. (Havey Dep. at 163-65.) Rather he included in his definition of a barricade items such as couches, tables, stove, bars, stoves, sinks, and beds. *(Id.* at 164.)

supervision of his officers. *See Febus-Rodriguez*, No. 93-1499, slip op. at 13 ("An important factor in determining whether a supervisor is liable is whether the official was put on notice of behavior which was likely to result in the violation of the constitutional rights of citizens."). In this scenario, there were no reports of past problems with the officers involved or with warrantless entries. The question is not whether Havey did all he could have but whether he did all that the Constitution requires. *Bowen v. City of Manchester*, 966 F.2d 13, 20 (lst Cir. 1992) (quoting *Rellergert v. Cape Girardeau County*, 924 F.2d 794, 797 (8th Cir. 1991)). This Court is satisfied that, although Havey's actions were certainly suspect, they passed constitutional muster and therefore he is immune from suit under § 1983 because of qualified immunity. The Court GRANTS Havey's Motion for Summary Judgment as to Count I of Plaintiff's complaint.

3. The County

A local governmental body may be liable under § 1983 for providing an inadequate training program. *City of Canton*, 489 U.S. at 390. Liability may be imposed "where-and only where-a deliberate choice to follow a course of action is made from among various alternatives." *Id.* at 389. Because the Court finds that the County's primary policymaker, Havey, was not deliberately indifferent to the need to provide additional training, the failure to provide such training cannot justifiably be said to represent county policy. *Id.* The County is therefore immune from suit under § 1983. The Court GRANTS the County's Motion for Summary Judgment on Count I of Plaintiff's complaint.

B. Plaintiff's Claim for Loss of Consortium under § 1983

Defendants contend that Plaintiff, individually, is not entitled to recover loss of consortium damages under § 1983. The Court agrees. The First Circuit has steadfastly held that "only the person *toward whom the state action was directed*, and not those incidentally affected, may maintain a § 1983 claim." *Pittsley v. Warish*, 927 F.2d 3, 8 (1st Cir.), *cert. denied*, 112 S. Ct. 226 (1991) (emphasis added). Plaintiff was not the subject of the officers' actions. The Court, therefore, GRANTS Defendants' Motion for Summary Judgment as it relates to Plaintiff's loss of consortium claims under § 1983. This decision, however, does not affect his status as a pendant party based on his state law claims. *See Rodriguez v. Comas*, 888 F.2d 899, 903 (1st Cir. 1989) (although "[s]ection 1983 does not create a federal cause of action for the emotional distress of a spouse . . . [a spouse may remain] as a pendent party plaintiff based on her state law claims.").

C. State Limits on Damages under § 1983

Defendants contend that Plaintiff's recoverable damages under § 1983 are limited by 18-A M.R.S.A. § 2-804(b) (Supp. 1993).[14] The First Circuit has held, however, that:

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[14]18-A M.R.S.A. § 2-804(b) (Supp. 1993) provides that:

> The jury may give such damages as it deems fair and just compensation with reference to the pecuniary injuries resulting from such death to the persons for whose benefit the action is brought, and in addition thereto shall give such damages as will compensate the estate of the deceased person for reasonable expenses of medical . . . [and] funeral expenses, and in addition thereto may give *damages not*

(continued...)

> [W]e believe, on balance, that the remedial purpose of [§ 1983] is better served by not permitting local variations allowing diminution of the amount of recovery. Rather, we will look to federal common law.

Caperci v. Huntoon, 397 F.-2d 799, 800 (lst Cir.), *cert. denied*, 393 U.S. 940 (1968) (rejecting Massachusetts law restricting punitive damages in a § 1983 action); *see also Frett v. Virgin Islands*, 839 F.2d 968, 977 (3d Cir. 1988) ("The presence of the section 1983 claim against the government . . . effectively removes the significance of the [Virgin Island's] Tort Claims Act $25,000 limit on judgments . . . ."). The Court, therefore, denies Defendants' request that Plaintiff's damages be limited by 18-A M.R.S.A. § 2804.

D. Punitive Damages

Defendants also request summary judgment on Plaintiff's demand for punitive damages. A jury may consider punitive damages in a § 1983 action if it finds either "reckless or callous disregard for the plaintiff's rights [or an] intentional violation[] of federal law." *Smith v. Wade*, 461 U.S. 30, 51 (1983). If a jury accepts Plaintiff's version of the events, it may find a reckless or callous disregard of Hegarty's rights. The Court,

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[14] (...continued)

> *exceeding $75,000 for the loss of comfort, society and companionship of he dececsed*, including any damages for emotional distress arising from the same facts as those constituting the underlying claim . . . and in addition thereto may give *punitive damages not exceeding $75,000* . . . .

(Emphasis added.)

therefore, DENIES Defendants' Motion for Summary Judgment on Plaintiff's demand for punitive damages as to his § 1983 claim.

IV. Maine Civil Rights Act

In Count II of Plaintiff's Complaint, he asserts a claim under the Maine Civil Rights Act. That Act "was patterned after 42 U.S.C. § 1983." *Grenier v. Kennebec County*, 733 F. Supp. 455, 458 n. 6 (D. Me. 1990). The same qualified immunity analysis applies under the Maine Civil Rights Act as under § 1983. *Jenness v. Nickerson*, No. 6773, slip op. at 6 (Me. Feb. 15, 1994). The Court, therefore, DENIES the Motion of Defendants Wright, Guay, Crawford, Hines, and Giroux for Summary Judgment on Count II; and GRANTS the Motion of Defendants Atwood, Demers, Havey, and the County for Summary Judgment on Count II.

V. State Claims

Plaintiff also brings two state claims, Count III (wrongful death) and Count IV (trespass). Both are governed by the terms of the Maine Tort Claims Act, 14 M.R.S.A. § 8101-8118 (1980 & Supp. 1993).

A. Discretionary Immunity

The individual officers and the supervisory Defendants contend that they are entitled to summary judgment on Plaintiff's state tort claims because they are protected by discretionary immunity. The Maine Tort Claims Act provides absolute immunity for employees of governmental entities for "[p]erforming or failing to perform any *discretionary* function or

duty, whether or not the discretion is abused . . . ." 14 M.R.S.A. § 8111(1)(C) (Supp. 1993) (emphasis added).

1. *Officers*

An officer is exercising a discretionary function if he or she is "required to use [his or her] judgment while acting in furtherance of a departmental policy tor a legislatively imposed duty]." *Moore v. City of Lewiston*, 596 A.2d 612, 616 (Me. 1991). Making a forcible entry to effectuate a warrantless arrest and the subsequent use of deadly force are discretionary functions. *See McPherson v. Auger*, No. 93-208, slip op. at 7 (D. Me. Jan. 6, 1994) ("Making a warrantless arrest is a discretionary function."); *Leach v. Betters*, 599 A.2d 424, 426 (Me. 1991) (parties agreed that warrantless arrest was a discretionary function); *McLain v. Milligan*, No. 93-129, slip op. at 14 (D. Me. Feb. 15, 1994) ("Defendant's decision to enter Plaintiff's home [and] to execute a warrantless arrest ... all required the exercise of judgment and hence qualify as discretionary functions under the Act."); *Roy v. City of Lewiston*, No. 93-218, slip op. at 4-5 (D. Me. Feb. 18, 1994) (officer's decision to use force was discretionary function).

Discretionary immunity is unavailable, however, when the officer's conduct was 80 egregious that it "clearly exceeded, as a matter of law, the *scope* of any discretion he could have possessed in his official capacity as a police officer." *Polley v. Atwell*, 581 A.2d 410, 414 (Me. 1990) (emphasis in original). This standard differs from that of qualified immunity. *See Maguire v. Municipality of Old Orchard Beach*, 783 F. Supp. 1475, 1487 (D. Me. 1992) (finding some defendants entitled to discretionary immunity but not qualified immunity and another defendant entitled to qualified immunity but not discretionary immunity); *see also McPherson*, No. 93-208, slip op. at 6, 12

(finding some defendants entitled to discretionary immunity but not qualified immunity). The Court is satisfied that, even assuming that the facts are as asserted by Plaintiff, the officers' conduct did not *clearly* exceed, as a matter of law, the scope of *any* discretion they could have possessed. The Court, therefore, GRANTS summary judgment in favor of Defendants Wright, Guay, Hines, Giroux, and Crawford on Counts III and IV.

2. *Supervisory Personnel*

Defendants Atwood, Demers, and Havey contend that they are entitled to discretionary immunity pursuant to 14 M.R.S.A. 8111(1)(C) (Supp. 1993). The Court agrees. The decisions challenged by Plaintiffs in this case involve training and supervision of officers. These functions require the "exercise of basic policy evaluation, judgment, and expertise on the part of the governmental agency involved," therefore, the Court finds that they are discretionary functions. *Polley*, 581 A.2d at 413. Furthermore, the actions of these Defendants did not clearly exceed the scope of their discretion. The Court, therefore, GRANTS summary judgment in favor of Defendants Atwood, Demers, and Havey on Counts III and IV.

B. Governmental Entity Immunity

The Maine Tort Claims Act grants broad immunity for governmental entities in 14 M.R.S.A. § 8103(1) (1980):

> Except as otherwise expressly provided by statute, all governmental entities shall be immune from suit on any and all tort claims seeking recovery of damages.

Section 8104-A provides four narrow exceptions to the immunity, none of which apply to the facts of this case.

A governmental entity may waive its immunity, however, by procuring liability insurance. *See* 14 M.R.S.A. § 8116 (Supp. 1993). The County bears the burden of establishing whether or not it was insured at the time of the shooting. *McLain*, No. 93-129, 81ip Op. at 23 (citing *Hill v. Town of Lubec*, 609 A.2d 699 (Me. 1992)). The County concedes that, "[a]t all times pertinent to the allegations in the Complaint," it had "comprehensive law enforcement liability insurance." (Fisher Aff. ¶ 3.) The County made no attempt to establish that this policy did not cover the substantive issues involved. The Court, therefore, DENIES the County's Motion for Summary Judgment on Counts III and IV.

C. Punitive Damages

The County also moves for summary judgment on Plaintiff's demand for punitive damages. The County has established that its liability insurance specifically excludes coverage for punitive damage awards. (*See* Fisher Aff. ¶ 4.) The waiver provisions of § 8116 do not apply, therefore, to the punitive damages portion of Plaintiff's claim. The Court, therefore, GRANTS the County's Motion for Summary Judgment as it relates to punitive damages in Counts III and IV.

VI. CONCLUSION

The Court DENIES the Motion for Summary Judgment on Counts I and II of Defendants Wright, Guay, Hines, Giroux, and Crawford. The Court GRANTS the Motion for Summary Judgment on Counts I and II of Defendants Atwood, Demers, Havey, and Somerset County. The Court DENIES Defendants'

Motion for Summary Judgment on Plaintiff's demand for punitive damages as it relates to Counts I and II. The Court GRANTS Defendants' Motion for Summary Judgment as it relates to Plaintiff's 1085 of consortium claims under § 1983.

The Court GRANTS the Motion for Summary Judgment on Counts III and IV of Defendants Wright, Hines, Guay, Giroux, Crawford, Atwood, Demers, and Havey. The Court DENIES the Motion for Summary Judgment on Counts III and IV of Somerset County. The County's Motion for Summary Judgment regarding punitive damages on Counts III and IV is GRANTED.

SO ORDERED.

/s/ Morton A. Brody
MORTON A. BRODY
United States District Judge

Dated at Bangor, Maine this 23rd day of March 1994.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 94-1473

JOHN M. HEGARTY AS PERSONAL REPRESENTATIVE OF THE ESTATE OF KATHERINE A. HEGARTY,
Plaintiff, Appellee,
v.
SOMERSET COUNTY, RENE GUAY, WILFRED HINES, THOMAS GIROUX, JR., WILLIAM CRAWFORD, JR.,
Defendants, Appellants.

No. 94-1474

JOHN M. HEGARTY AS PERSONAL REPRESENTATIVE OF THE ESTATE OF KATHERINE A. HEGARTY,
Plaintiff, Appellee,
v.
SOMERSET COUNTY, ET AL.,
Defendants, Appellants.

No. 94-1517

JOHN M. HEGARTY, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF KATHERINE A. HEGARTY,
Plaintiff, Appellant,
v.
SOMERSET COUNTY, ET AL.,
Defendants, Appellees.

JUDGMENT

Entered: May 17, 1995

This cause came on to be heard on appeal from the United States District Court for the District of Maine, and was argued by counsel.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The judgment for defendant Havey is affirmed and the cause is remanded to the district court with instructions to vacate the judgment entered for plaintiff and enter summary judgment for the defendant offices, and for such further proceedings as may be appropriate and consistent with this opinion.

The parties shall bear their own costs.

By The Court:
FRANCIS P. SCIGLIANO, CLERK

By: /s/ Janice M. O'Neil
Chief Deputy Clerk

[cc: Messrs. Fisher, Badger Jr., and Sweet]

(2)

Supreme Court, U.S.
FILED
NOV 17 1995
CLERK

No. 95-629

In The

Supreme Court of the United States

October Term, 1995

JOHN M. HEGARTY, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF KATHERINE A. HEGARTY,

Petitioner,

vs.

SOMERSET COUNTY, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF IN OPPOSITION FOR RESPONDENT GARY WRIGHT

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STATEMENT OF THE CASE

On May 15, 1992, the Sheriff's Department for Somerset County, Maine received a telephone call from a camper reporting that "we got a lady shooting at us in the woods" at a campsite registered with the State. App. at 668.[1] The dispatcher was told in pertinent part:

> RD: Yes, uh, my names Bob Day, Alfred, Maine, I'm at Speedy's Truck Stop Jackman, Maine. We're camping, there's four of us, and we got a lady shooting at us in the woods.
>
> SO: A lady shooting at you in the woods?
>
> RD: Yes. We're at a campsite, it's all registered with the State, everything, we're there, a lady comes out of another camp and starts shooting at us. . . .
>
> SO: 10-4. I'm all set, I have a complaint in Jackman, shots fired at individuals.
>
> 04: Shots fired at what?
>
> SO: People. . . .
>
> SO: Okay, where are the other people?
>
> RD: They're right here beside me.
>
> SO: Okay. They're right there.

---

1. All references in this Brief to the record are to the Joint Appendix ("App.") on file with the Court of Appeals for the First Circuit.

RD: We jumped in the truck, we headed out of there, she's shooting, started shooting at us, and, uh, she followed us all the way out the road and then she stopped and went back and we kept going. . . .

SO: Do you have any idea who the woman is?

RD: No, I don't. I have no idea if she's following us, or whatever, but she's got a loaded gun and . . .

SO: What does she have for a gun?

RD: I think it's a .22, but I'm not quite sure.

SO: Rifle? Pistol?

RD: It's a rifle. And she's drunk.

SO: Okay, I want you to stay right there.

RD: Yuh, I mean, all our stuff is there and she's already ransacked it once, we're pretty sure, ... And she's probably down there ransacking our stuff again.

SO: How do you know she's drunk?

RD: How, you know, I mean, you know, like we can tell.

SO: Why? I mean . . .

RD: I, I mean, she, believe me, (covered by radio traffic) completely. I mean, flipped right out.

SO: Okay.

RD: Not making any sense, or, I mean, unbelievable.

SO: Okay, I want you to stay right there. . . .

RD: What do we do if she comes here and starts shooting through the windows?

SO: I'd certainly take cover or leave.

App. at 668-671.

Deputy Rene Guay received an urgent radio call from his dispatcher, who advised him that a woman had fired approximately 30 bullets at four campers and that the campers had retreated to the Haynes Truck Stop (a/k/a "Speedy's Truck Stop"). App. at 241-42, 600. The dispatcher told Guay that the campers were afraid that the woman who shot at them would follow them to the truck stop. App. at 242, 600. Sergeant Wilfred Hines, Sergeant William Crawford, Deputy Thomas Giroux, and Maine State Trooper Gary Wright also responded. App. at 192, 242, 294, 571, 575, 588, 600.

Deputy Giroux, the first officer to meet with the campers, was also briefed by the dispatcher. App. at 75-76, 77, 611, 613.[2] When the campers described to Giroux the location where the

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2. All salient facts told to the dispatcher were also told by the campers to one or more of the officers at the truck stop. App. at 76-79, 83, 95, 198-201, 204-05, 219, 242, 296, 298, 571-75, 577, 600-02, 611-15, 669-70.

shooting had occurred and the woman who had done the shooting, Giroux knew that the woman had to be Katherine Hegarty. App. at 76, 245, 612. Giroux had hunted and fished in the area for 40 years and had known Hegarty for approximately 14 years. App. at 78, 612. Giroux described the campers as being "nervous wreck[s]" at the truck stop. App. at 76, 612. When Deputy Guay arrived at the truck stop, he noted that the campers were visibly frightened. App. at 243. When Guay heard the campers describe the woman who had shot at them, the location of her cabin, and her vehicle, he had "no doubt" that the woman was Katherine Hegarty. App. at 245, 572.

The campers told the officers that they had arrived at the campsite near Sandy Stream late in the afternoon on May 15, 1992. App. at 198, 571. The campsite was located on paper company property a "stone's throw" from the Hegarty cabin. App. at 78, 572, 613.[3] The campers reported to the officers that when the last two campers returned from fishing, Hegarty repeatedly asked them what they were doing. App. at 198-99, 571, 600-01. The campers told Hegarty they would leave first thing in the morning, but Hegarty continued to yell and scream at them, and she told them that they could leave "only if I let you leave." App. at 79, 199, 243, 571-72, 601, 614.

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3. In his Petition the Petitioner boldly asserts, without record citations, that the campers "dismantled her [Hegarty's] gate, trespassed on her property . . ." Petition at 4. The Petitioner also asserts that the campers "had illegally set up their camp and started a fire on her land." Petition at 5. There is absolutely no evidence that the campers *ever* trespassed on Hegarty's property. *See* entire record. Although the campers stated the campsite they were occupying was registered with the State, App. 668, and Jack Hegarty states that it was not so registered, App. 885, this difference is truly immaterial. Whether the campsite was registered or not, Katherine Hegarty had no right to shoot the campers. Most notable is the conspicuous absence of any assertion, even in Mr. Hegarty's affidavit, that the area in question was the Hegartys' property. App. 885.

The campers reported that Hegarty then started shooting at them. App. at 199, 572-73, 601. Hegarty shot five or six rounds at them, re-entered the cabin, turned the lights on, reloaded, turned the lights off, returned outside and shot five or six more rounds at them. App. at 78, 199, 572-73, 601. She reportedly repeated this sequence five or six times. App. at 78, 572.[4] The campers attempted to hide. App. at 199, 572, 601. The campers reported to the officers that they eventually figured out and timed Hegarty's reloading pattern, jumped in their truck and escaped. App. 78, 200, 613-14. There was only one exit from their campsite, and as the campers passed by the Hegarty cabin in their truck, Hegarty came out of the cabin, stood on the front porch and pointed a rifle at them. App. at 78-79, 200, 573, 601, 613-14. The campers did not know whether Hegarty shot at them as they drove by because they were shaken and travelling so fast. App. at 79, 200, 573, 601, 614. Hegarty then entered her vehicle and chased them at high speeds. App. at 200, 573, 613-14.

The campers expressed to the officers their belief that Hegarty might have been drinking. App. at 200, 573. The campers expressed concern that Hegarty would pursue them to

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4. The Petitioner also argues to this Court that: "They [the officers] further concluded that she [Hegarty] had not intended to hit the campers because she had a reputation as an expert shot and could have hit them if she really wanted to." Petition at 5. The Petitioner simply ignores two points in making this assertion. First, for the crimes for which Hegarty could be arrested, she need not have intended to hit the campers. *See, e.g.*, Me. Rev. Stat. Ann. tit. 17-A, § 210 ("a person is guilty of terrorizing if he communicates to another person a threat to commit . . . a crime of violence dangerous to human life . . . and the natural or probable consequence of such a threat, whether or not such consequence in fact occurs, is: A. To place the person to whom the threat is communicated or the person threatened in reasonable fear that the crime will be committed . . ."); § 211 ("A person is guilty of reckless conduct if he recklessly creates a substantial risk of serious bodily injury to another person."). Second, the Petitioner ignores the fact that Hegarty was reportedly drunk when firing the shots. App. 200, 573, 670.

the truck stop; they also expressed concern for other campers who were in the area. App. at 83, 195, 245, 298, 571, 613, 671. The campers told the officers that there were other campers in the area; they did not know if anyone else was near the Hegarty cabin on the opposite side of Sandy Stream. App. at 83, 195, 200-01, 204-05, 574. Guay knew of at least one campsite beyond Sandy Stream, close to where the four campers had been camping. App. at 602. Giroux knew of campsites within 1/8 mile of the Hegarty camp. App. at 83. The officers observed a number of occupied campsites on their way to the Hegarty cabin. App. at 88, 204, 577, 616. Giroux knew that the rest of the woods were usually "full of people" if those campsites were occupied. App. at 615.

Hines, the ranking officer, decided Hegarty would be arrested for shooting at the campers. App. at 298, 574, 603. The officers formulated a plan to locate Hegarty, investigate the campers' complaint, contain Hegarty, negotiate as necessary, and ultimately to arrest her. App. at 193.[5] Under the plan as formulated, Giroux was to attempt first to communicate with Hegarty as they knew one another well. App. at 98, 140. Once in custody, Hegarty was to be referred for a psychological evaluation. App. at 193. The situation was to be reassessed as they went along. App. at 195.

Hines, Guay, Giroux and Wright were all familiar with Hegarty's history of questioned mental instability and aggressiveness. App. at 197, 304-06, 575-76, 601-02, 612.[6]

---

5. Hines had been trained at the Maine Criminal Justice Academy not to tell a subject that (s)he was under arrest if doing so placed the life of an officer, or some other person, in danger. App. at 202, 214, 219.

6. The Petitioner asserts that "[a] highly controverted issue in this case was whether Mrs. Hegarty was mentally imbalanced or irrational that day and whether she had a history of mental problems." Petition at 6. The relevant (Cont'd)

Wright had previously arrested Hegarty twice in one night during November, 1991 for operating under the influence of alcohol ("OUI") in Jackman, Maine. App. at 197, 303-04. After being released from the first arrest, Hegarty *drove* to Wright's home, screamed, laughed and made a commotion. She then drove off and Wright arrested her again for OUI. App. at 304-05, 602. Guay had assisted Wright on this night, and Guay determined, based on his own personal observation, that Hegarty was "irrational." App. at 250.

Wright had also been called to the Hegarty residence in the fall of 1991 due to Hegarty's mental instability; he had been directed by his dispatcher to assist with a "psychotic breakdown." App. at 306. Upon his arrival, he saw the ambulance parked in the Hegarty driveway; two ambulance attendants exited the residence and told Wright they would be transporting Katherine Hegarty. App. at 306. Wright went into the residence and heard "things breaking, smashing, screaming, hollering, yelling, laughing." App. at 306. Giroux learned from the ambulance attendants that Katherine Hegarty was removed from her house under sedation. App. at 79-80, 306, 612. Wright told the other officers that he had dealt with Hegarty before, that she knew how to use a gun and that she could be violent and extremely aggressive. App. at 575. The Petitioner's own expert witness testified that the officers believed Katherine Hegarty had a

---

(Cont'd)
inquiry is the officers' reasonable understanding of her condition, not Mrs. Hegarty's actual mental condition. *See* Argument, *infra* at 24. The focus must be on the information in the officers' possession at the time they responded to the campers' complaint. The Petitioner also asserts that "the evidence . . . showed Katherine's 'history of emotional instability' to be attributable to one isolated occurrence several years earlier. The officers' knowledge of this occurrence was based solely on hearsay and rumor." Petition at 6. Directly contrary to this assertion, the officers' collective knowledge of Hegarty's history of instability was based upon personal observation of at least two incidents within less than one year before the incident in question.

history of mental instability, and the officers were justified in so concluding. App. at 385.

The officers proceeded to the area of the Hegarty cabin. At that point, the officers did not know Hegarty's whereabouts or if other people were nearby. App. at 89, 130, 298-301, 307, 577-78. It was *urgent* to reach the Hegarty cabin because "[t]he campers just said some lady fired 30-some-odd shots at them and that there [were] other campers in the area and that she had followed them out," and the Hegarty cabin was the "first place to start looking" for her. App. at 195. The officers drove part of the way and walked the rest of the way to the Hegarty cabin to lessen the chance of a violent response by Hegarty. App. at 96, 578. After the officers left the cruisers, they had no means of communication with the dispatcher or others, due to the remoteness of the location. *See* App. at 139, 590. Although it was after dark, it was a clear night and the moon was full. App. at 203, 577.

When the officers reached the Hegarty cabin, they noted the area around the cabin itself was wide open, and there were no lights on. App. at 90, 205-06, 253, 302, 603-04. The officers crossed the clearing. App. at 207, 578-79, 591-93, 616. Once the officers were positioned around the cabin, Giroux repeatedly shouted words to the effect, "Kathy Hegarty, this is Tommy Giroux, I'd like to speak with you. Please open the door so that I can talk to you." App. at 208, 616. He shouted to Hegarty for what seemed like a "long time" without any response. App. at 92, 617.

Hines then knocked on the cabin door and identified himself by name and as a law enforcement officer. App. at 208-09, 579. He told Hegarty he wanted to speak with her and asked her to come to the door. App. at 208, 211, 579.

At about the same time, Crawford conducted a perimeter

search of the cabin. App. at 142, 591-92. When Crawford shined his flashlight into a window, Hegarty swung her rifle and pointed it "right in [his] face." App. at 144-45, 592-93.[7] Scared, he dropped to the ground and yelled that she had a gun. App. at 145-46, 209, 593. Thus, the first time the officers knew Hegarty's whereabouts was when she pointed the gun at Crawford. App. at 141-45. Crawford identified himself by name and as a law enforcement officer and said, "Kathy, we want to talk to you." App. at 145. Giroux continued calling to Hegarty, and the officers heard her walking in the cabin. App. at 145, 209-10.[8]

After hearing Crawford's warning, Hines feared that Hegarty might use the weapon against either the officers or herself. App. at 214, 579, 582. It was not safe for the officers to retreat from the cabin, because the area around it was wide open and it was a bright moonlit night. App. at 218-19, 258, 579-80. If they retreated, they would have been clear targets to anyone inside the cabin. App. at 219, 579-80. Even so, the cabin walls were very thin, and they could have been shot directly through the cabin walls. App. at 219, 580.

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7. The Petitioner asserts that "[l]ess than three minutes before she was killed, Katherine Hegarty was awakened by Sgt. Crawford illuminating her bedroom with a flashlight . . . Still in bed, she reached for a long rifle . . . ." Petition at 7. No evidence exists to support this inflammatory statement: there is no evidence that Hegarty was asleep at the time Crawford illuminated the room, and the time frame set forth by the Petitioner is similarly without record support. Contrary to the bold assertion in the Petition, no evidence exists that Hegarty was unarmed at the time Crawford shined his light into the room.

8. Once again, contrary to the Petition in this case, no evidence exists that Hegarty walked into the front room of the cabin unarmed. Petition at 7. Hegarty either walked into the front room armed, or she had additional gun(s) in the front room, but no material difference of facts exists in this regard.

Giroux continued to request that Hegarty talk to him. App. at 92, 617-18. Guay, who also knew Hegarty on a first-name basis, identified himself. App. at 604. Hegarty responded by making unusual sounds and laughing "like a witch." App. at 211, 256, 604-05. After a period of time, Hegarty said to Guay words to the effect, "I can see you" in a "half baby-half witch" voice. App. 93, 256-257, 605-06. Guay shined his flashlight in the cabin window, illuminating Hegarty's face and her immediate surroundings. App. at 256-58, 605-06. Hegarty was kneeling on a couch with her face pressed up against the front window of the cabin. App. at 211, 218, 256, 605. She "smiled" at Guay with an unusual ("weird") expression on her face. App. at 95, 606. Guay told Hegarty that the officers were investigating camp burglaries and that they thought she might have seen someone that night. App. at 93, 211, 256, 311, 581, 605, 618-19. Hegarty told Guay that she had not seen anybody. *Id.*[9]

The four deputies were in uniform that clearly identified them as law enforcement officers. App. at 214; *see also* 256-57, 605. Hegarty knew for a fact that at least Guay and Giroux were indeed law enforcement officers. App. at 92, 208, 211, 311.

The officers continued their attempts to communicate with Hegarty to no avail. App. at 211, 605-06. They repeatedly asked Hegarty to turn the lights on and to come to the door. App. at 211, 257, 606. They repeatedly told her that it was safer for her and the officers if she did that. App. at 606. Hegarty responded by

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9. The Petitioner's assertion that Hegarty acknowledged to the officers that men had been around but that she could not describe them is without record support. *See* Petition at 7. Moreover, earlier in the evening, Wright had in fact received a complaint concerning burglaries in the area. App. at 256, 605. Finally, for the Petitioner to suggest that Hegarty, who had just repeatedly fired her gun at other human beings, was mentally stable yet had no idea that the officers may have been investigating that complaint, seems disingenuous.

laughing "like a witch." App. at 210-11, 256, 580, 593, 606. During the course of the officers' presence at the Hegarty cabin, Hegarty sometimes acted irrationally, sometimes made statements, and sometimes laughed oddly. App. at 146, 210-11, 256-57.

When Hegarty was on the couch, Crawford and Guay observed the area around Hegarty and did not see a weapon. App. at 148, 257, 594, 606. Not seeing a weapon, Guay said to Hines words to the effect, "She doesn't have a gun, go." App. at 149, 312, 582, 594, 606, 619.[10] Believing there was a good opportunity safely to separate Hegarty from her weapons and arrest her, Hines pulled open the screen door and kicked the front door. App. at 194, 215, 582, 584-85. The door casing split and the lock broke, but a chain kept the door from fully opening. App. at 215, 582. Hines kicked the door again and it opened. App. at 216, 582.

As Hines was attempting to get into the cabin, Guay saw Hegarty in front of the couch with her rifle in her hands. App. at 259, 607. When Guay saw Hegarty with the rifle, he yelled, "She's got a gun. Don't go." App. at 583, 607, 619. By this time, the door was opening and Hines was part-way into the cabin. App. at 216, 583. Hegarty looked toward the door and the barrel of her gun was pointed at the floor. App. at 152, 164, 259, 607. Her left hand was on the rifle forebarrel, her right hand on the

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10. The Petitioner argues, without record citation, that ". . . no officer believed she [Hegarty] posed any immediate danger." Petition at 7. The record reveals that the officers were around a cabin in the middle of a clearing on a moonlit night. The walls of the cabin were paper-thin. The area surrounding the cabin was an all "kill zone." App. at 219. The officers were on foot, with no means of communication to their dispatcher or others. Hegarty had reportedly fired 30 or so rounds at other human beings earlier. She had a history of mental instability and was acting inconsistently. She was suspected to have been drinking. Hegarty had just pointed a gun directly at Crawford. To say Hegarty posed no immediate danger is to stretch the facts beyond recognition.

stock and trigger, and she began raising the rifle toward the doorway. App. at 259-60, 607. *See also* 216. Guay was able to keep the area where Hegarty was located lit. App. at 260, 606. Hines then saw Hegarty smiling and standing in a shooting stance with the rifle. App. at 216, 583. Hegarty raised the rifle toward Hines. App. at 216, 313, 583. Her finger was inside the trigger guard. *Id.*

Guay and Hines repeatedly ordered Hegarty to "put the gun down, put it down, put it down," or words to that effect. App. at 260, 583, 596, 607-08, 619. Instead, Hegarty *continued to raise* the rifle. App. at 216, 583. Hegarty further swung toward the door and kept "*shouldering*" her rifle. App. at 313. When Hegarty's rifle was raised and pointed so that it was aimed directly at the center of Hines's chest, and she did not comply with the officers' order to "put the gun down," Hines, Guay and Wright all discharged their firearms, seemingly simultaneously. App. at 152-53, 216, 583, 596, 607-08, 619. The shots were fatal.

An inspection of the campers' campsite showed that their equipment had been thrown into the stream. App. at 584. Some of it had bullet holes in it. App. at 584. Officials found personal property belonging to the four campers in Hegarty's cabin. App. at 584.

Katherine Hegarty's husband, John, filed this lawsuit in the United States District Court for the District of Maine in his individual capacity and as personal representative of the Estate of Katherine Hegarty. Mr. Hegarty asserted several legal theories, including a violation of his and his wife's civil rights pursuant to 42 U.S.C. § 1983. All Respondents moved for summary judgment on all counts; the District Court denied the motions of the police officers asserting qualified immunity. The officers appealed to the United States Court of Appeals for the First Circuit. The Court of Appeals vacated the order denying summary judgment and

directed the District Court to enter summary judgment in favor of the officers on the basis of qualified immunity. The Petitioner now seeks review by this Court.

REASONS FOR DENYING THE WRIT

I.

THIS COURT'S RECENT DECISION IN *JOHNSON V. JONES* DOES NOT WARRANT THE GRANTING OF A WRIT OF CERTIORARI IN THIS CASE.

Following the issuance by the Court of Appeals of its decision in this matter, the Petitioner filed a Petition for Rehearing on or about June 7, 1995. Before the Court of Appeals issued a ruling on the Petition, this Court rendered its opinion in *Johnson v. Jones*, __ U.S. __, 115 S. Ct. 2151, 132 L. Ed. 2d 238 (1995), limiting the right to appeal from a denial of qualified immunity in certain cases. On or about June 21, 1995 the Petitioner filed a "Supplemental Petition for Rehearing," attaching a copy of the *Johnson* opinion and asking the Court of Appeals to throw out the case it had just decided. The Court of Appeals declined to do so. The Petitioner now argues that this Court should grant his Petition for a Writ of Certiorari and remand the case to the Court of Appeals with instructions to reconsider its decision in light of *Johnson*. Petition at 28-29.

Since the Petitioner attached a copy of *Johnson* to his Supplemental Petition for Rehearing, there is no reason to believe that the First Circuit has not already considered any potential ramifications of *Johnson* in connection with this case. Moreover, as is more fully discussed below, *Johnson* does not apply unless there is a finding of a genuine factual dispute. Throughout the appellate process the Petitioner has attempted, through gross distortion of the record, to create the appearance of a genuine

factual dispute where none exists. The Petitioner continues this practice in seeking a Writ of Certiorari in this Court. For the reasons described below, *Johnson* does not apply to this case and the Petition should be denied.

A. The District Court Did Not Base Its Denial of the Respondents' Motions for Summary Judgment on the Existence of a Material Factual Dispute.

In *Johnson*, __ U.S. at __, 132 L. Ed. 2d at 251, this Court held:

> [A] defendant, entitled to invoke a qualified immunity defense, may not appeal a district court's summary judgment order insofar as that order determines whether or not the pretrial record sets forth a "genuine" issue for trial.

The Petitioner makes a strenuous but disingenuous effort to create the appearance of a genuine factual issue in this case, but no genuine dispute exists and neither the District Court nor the Court of Appeals noted any such dispute. In fact, while the Petitioner accuses the Court of Appeals of misapplying the summary judgment standard by failing to view the record in the light most favorable to him (an argument the Respondent will address in Part II below), there is little difference between the facts recited by the District Court and those recited by the Court of Appeals on the crucial question of what information the police officers possessed at critical moments before and during their encounter with Katherine Hegarty. *See Anderson v. Creighton*, 483 U.S. 635, 641 (1987) (relevant question in qualified immunity determination is whether a reasonable officer could have believed the conduct lawful in light of clearly established law and information the officers possessed). For example,

regarding Katherine Hegarty's initial confrontation with the campers, the District Court opinion states:

> Sometime around 9:00 p.m., Hegarty confronted the campers asking who gave them the key for the gate. The campers believed Hegarty was either intoxicated or mentally unstable. Hegarty told the campers, among other things, "this is my house and you're invading my privacy." After another verbal exchange, the campers told Hegarty that they would leave in the morning. Hegarty responded, "[o]nly if you make it 'til the morning." Hegarty went into the cabin and retrieved a gun, and then, from her porch, fired a number of shots in the air in the vicinity of the campers.... One of the campers asked Hegarty if they could leave, and Hegarty responded that she would follow them to see how they got through the gate. During one of Hegarty's trips into her cabin, the campers got into their truck and drove away quickly. As the campers passed Hegarty's cabin, they saw her come out with a gun but they are unsure whether she fired any shots. The campers believed that Hegarty followed them part way down the dirt road.

Hegarty v. Somerset County, 848 F. Supp. 257, 261-62 (D. Me. 1994) (record citations omitted). Regarding the same confrontation, the Court of Appeals opinion says:

> At around 9:00 that evening, Katherine Hegarty became extremely agitated when she saw the campers returning to their campsite

> for the night, and began screaming that they had trespassed on her property. The campers assured her that the caretaker had given them permission to use the campsite and they would be leaving the next morning. To which Katherine responded: "Only if you make it until the morning." She then retrieved a rifle from inside the cabin and fired six rounds from the porch in the direction of the campers, who immediately took cover behind their trucks and boat. During the next hour or so, Katherine reloaded her rifle several times, firing approximately twenty-five additional rounds in the direction of the campers before eventually yielding to their pleas for permission to depart in safety. . . . [T]he campers drove their vehicles quickly past the cabin, where they saw Katherine on the porch, rifle in hand. Although no further shots were fired, Katherine followed the campers in her truck beyond the entrance gate, then turned back in the direction of her cabin.

Hegarty v. Somerset County, 53 F.3d 1367, 1370 (1st Cir. 1995). Both of these accounts convey the same information about the situation that prompted the campers' call to the police for help: a woman began yelling at them for no reason apparent to them, then began shooting at them, at once both ordering them to leave and making it impossible for them to do so safely. When they did finally find a break in the shooting and began to drive away, she jumped in her truck and followed them. None of these facts are disputed.

In addition to the above, both courts note that Katherine Hegarty was a registered Maine guide with a reputation for excellent marksmanship. 848 F. Supp. at 261; 53 F.3d at 1370.

Both courts describe the officers' familiarity with Katherine Hegarty's past unstable behavior:

> Several of the officers had concerns about Hegarty's mental and emotional condition. Giroux's concerns were based on an incident in which Hegarty had to be sedated. Wright had arrested Hegarty the previous year for operating under the influence and the two became involved in a dispute at that time. Wright told all of the other officers involved about the dispute.

848 F. Supp. at 262, n.4 (record citations omitted). The Court of Appeals said:

> [T]he officers knew she had some history of emotional instability (*i.e.*, a nervous "breakdown" in 1991, requiring sedation, physical restraints and a brief period of involuntary hospitalization), substance abuse (two arrests for operating a motor vehicle while under the influence of alcohol ("OUI") in 1991), and incidents of erratic, violent behavior directed at law enforcement personnel — kicking and throwing punches at State Trooper Gary Wright, asking irrational questions, and exhibiting extreme mood swings (alternately screaming and laughing) at the time of her first OUI arrest, and an assault/harassment against Trooper Wright at his residence shortly after the same arrest.

53 F.3d at 1370-71. While the Court of Appeals includes more detail in its account (all of which is based on undisputed facts in

the record, as described above in the Statement of the Case), both statements convey the same understanding of what information the officers possessed regarding Katherine Hegarty's emotional state.

The two courts' descriptions of the events that took place at the cabin — culminating in the death of Katherine Hegarty — are once again substantially similar. Both courts relate that the officers approached the cabin on foot, heard loud music playing on the radio but saw no lights on inside the cabin; that Deputy Giroux called out to Hegarty but there was no response; that the first time any of the officers saw anyone inside the cabin was when Katherine Hegarty pointed her rifle at Sergeant Crawford; that the officers did not tell Hegarty that she was under arrest or that they intended to arrest her; and that during the officers' conversation with her she laughed intermittently and "appeared to be intoxicated or mentally unstable." 848 F. Supp. at 262-63; 53 F.3d at 1371. Similarly, both courts note that the officers waited to enter the cabin until they thought Katherine Hegarty was unarmed; that Deputy Guay gave the signal to go in; that Sergeant Hines then kicked the door in; that Katherine Hegarty picked up her rifle and pointed it at Hines and Trooper Wright; and that the officers discharged their weapons after Hegarty ignored repeated requests to put her gun down. *Id.*

Importantly, the difference in outcome in the two courts lies not in the facts themselves but in the application of the law to the facts. The District Court concluded that on the basis of the stated facts "the officers could not reasonably have believed that their forcible intrusion into Hegarty's home was justified by exigent circumstances." 848 F. Supp. at 264. The Court of Appeals concluded on the same facts

> that a competent police officer — possessing the same information the defendant officers

> had on May 15, 1992 — reasonably could have believed both that there existed probable cause to arrest Katherine Hegarty and exigent circumstances justifying their immediate warrantless entry.

53 F.3d at 1379.

Unlike in *Johnson* — where the issue presented on summary judgment was an absolute factual dispute as to whether the plaintiff could prove that the defendants were present or participated in the use of excessive force during arrest and booking — the summary judgment issue in this case is whether the officers' conduct was objectively reasonable in light of the information they possessed. *Anderson*, 483 U.S. at 641. The question of objective reasonableness is one of law for the Court to decide. *Prokey v. Watkins*, 942 F.2d 67, 73 (1st Cir. 1991). It is only where there is a genuine dispute as to what the officers knew prior to the challenged conduct that a jury question arises. *Id.* The District Court *did not* rule in this case that there was a dispute as to what the officers knew.[11] Instead, the Court held that given what the officers knew, they should not have made the entry into the Hegarty cabin. The Court of Appeals disagreed, not referring to any factual differences, but citing substantial legal authority to support its conclusion that the officers' conduct was objectively reasonable under the circumstances. *Hegarty*, 53 F.3d at 1379.

This case does not entail the *Johnson* "we didn't do it" defense with its attendant factual dispute, and *Johnson* does not apply to this case. There is no reason for further review of the decision of the Court of Appeals. The Petitioner's elaborate attempt to re-construct this case as one presenting hotly disputed facts collapses in the face of a realistic review of the record.

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11. While the Court took note in a couple of instances of contested details, none of these related to the issue at hand. *See, e.g.*, 848 F. Supp. at 262.

II.

THE COURT OF APPEALS FULLY CONSIDERED AND CORRECTLY DECIDED THE ISSUES.

Although the only relief the Petitioner requests in his Petition is that this Court remand the case to the Court of Appeals with directions to reconsider the case in light of *Johnson*, the Petitioner repeatedly refers to allegedly egregious errors committed by the Court of Appeals. Foremost among these is the supposed failure of the Court of Appeals to view the record in the light most favorable to the Petitioner. The opinion of the Court of Appeals amply demonstrates that the Court was aware of and applied the correct standard, both in reviewing the summary judgment record and in deciding the qualified immunity issue.

A. The Summary Judgment Standard.

Rule 56(c) of the Federal Rules of Civil Procedure requires the court to enter summary judgment in favor of a party "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." As this Court noted in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986):

> By its very terms, this standard provides that the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact.

With respect to the materiality component, the *Liberty Lobby* Court said:

> [T]he substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted.

Id. Although "[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor . . . ," *id.* at 255, there is certainly no requirement that the Court permit *distortions* of the record in the Petitioner's favor. *Lellemand v. University of Rhode Island,* 9 F.3d 214 (1st Cir. 1993). "Unsupported allegations are insufficient to create a genuine dispute." *Ortega-Rosario v. Alvarado-Ortiz,* 917 F.2d 71, 73 (1st Cir. 1990).

B. The Substantive Law of Qualified Immunity.

In order to address the Petitioner's argument that this case presents genuine issues as to material facts precluding summary judgment (an argument which, as discussed above, neither the District Court nor the Court of Appeals endorsed), it is necessary to consider the applicable substantive law. In a case like this, where the Petitioner alleges a warrantless entry and excessive use of force by police officers,[12] the Fourth Amendment governs the analysis. *See Minnesota v. Olson,* 495 U.S. 91 (1990) (applying Fourth Amendment analysis to warrantless entry); *Graham v. Connor,* 490 U.S. 386, 395 (1989) (all claims that law enforcement officers have used excessive force are analyzed

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12. Initially the Petitioner argued that neither probable cause nor exigent circumstances existed to justify a warrantless arrest and that the officers used excessive force in entering the cabin. The Petitioner does not raise the probable cause issue in this Court, but limits the alleged constitutional violations to the warrantless entry and the alleged use of excessive force. Petition at 16-18.

under the Fourth Amendment and its "reasonableness" standard).

The qualified immunity analysis begins with the proposition that

> government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.

Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). In a case involving an allegedly unreasonable search or seizure the inquiry focuses on "whether a reasonable officer could have believed [the conduct] to be lawful, in light of clearly established law and the information the . . . officers possessed." *Anderson v. Creighton,* 483 U.S. 635, 641 (1987). A law enforcement officer who reasonably but mistakenly concludes that probable cause and/or exigent circumstances exist is entitled to qualified immunity. *Id.* Otherwise stated, "The qualified immunity standard 'gives ample room for mistaken judgments' by protecting 'all but the plainly incompetent or those who knowingly violate the law.' " *Hunter v. Bryant,* 502 U.S. 224, 229 (1991) (*quoting Malley v. Briggs,* 475 U.S. 335, 343, 341 (1986)).

In reaching its decision that the officers acted reasonably, the Court of Appeals relied on undisputed facts regarding the information possessed by the officers at the relevant times. *Hegarty,* 53 F.3d at 1375-76. The Petitioner takes issue with the Court's reference to Katherine Hegarty's emotional instability. According to the Petitioner, he "specifically and seriously contested" Katherine Hegarty's history of emotional instability, violence, irrational behavior and unpredictability. However, on examination of the few record citations the Petitioner has provided, Petition at 20, it is evident that the Petitioner did *not*

generate any genuine issue on any relevant points. For example, the Petitioner seems to think there is an inconsistency between Deputy Giroux's statement that he knew that Katherine Hegarty had been involuntarily committed to a hospital for mental or emotional problems during the fall of 1991 (Somerset County Defendants' Statement of Undisputed Facts ¶ 4, App. at 544), and Giroux's testimony that he was told by others that Mrs. Hegarty had been taken by ambulance to a hospital during the fall of 1991. App. at 847. This supposed inconsistency is lost on the Respondent, and certainly does not rise to the level of a material dispute.

The Petitioner also attempts to create the illusion of a factual dispute by comparing the statement that Giroux knew that Katherine Hegarty had been arrested by Wright for OUI and had been extremely combative and assaultive when Wright arrested her (Somerset County Statement ¶ 4, App. at 545), with Giroux's testimony that he had been told that Wright had arrested Katherine Hegarty previously and that she had assaulted him in his kitchen. App. at 847. Again, this is not a genuine dispute. Similarly, contrary to the Petitioner's assertion, there is no discernible difference between the statement that the briefing Sergeant Crawford received before going in search of Katherine Hegarty raised questions in his mind about her mental stability (Somerset County Statement ¶ 9, App. at 547) and Crawford's testimony that he was "concerned" that Katherine Hegarty might be mentally unstable that evening. App. at 852. In none of these instances has the Petitioner explained how a difference in semantics or emphasis creates a genuine factual issue or negates the conclusion that the officers reasonably believed Katherine Hegarty was mentally unstable on the night in question.[13]

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13. On the mental instability question, it is also significant that the Petitioner's own expert, Mr. MacLaran, testified that the officers believed that Katherine Hegarty had a history of mental instability and that they were justified in so concluding. App. at 385.

The Petitioner states that the Court of Appeals "grossly distorted" the record in describing the campers' reaction to having been screamed at, shot at, and chased through the woods by Katherine Hegarty. Petition at 20. To the contrary, the Court's reference to Katherine Hegarty as "flipped out" and "intoxicated" as well as the statement that she "might pursue them to the truck stop and shoot at them" comes directly from the transcript of the call by camper Robert Day to the Somerset County Sheriff's Department made as soon as the campers came out of the woods. *See* Statement of the Case, *supra* at 1-2. This was the first information provided to the officers as they were called to the scene.

The Petitioner continually harps on alleged evidence in the record indicating that Katherine Hegarty was not irrational or violent. This argument ignores the fact that the relevant inquiry is not whether Mrs. Hegarty was *actually* irrational or violent, but whether the officers could reasonably have so believed based on the information they possessed. *E.g., Gibson v. Officer, P.A.*, 44 F.3d 274, 277-78 (5th Cir. 1995) (proper focus is not upon factual dispute as to whether suspect was intoxicated, but whether objective facts might lead a reasonable officer so to conclude). As previously discussed, there is no dispute as to the information the officers possessed in this regard.

The Petitioner states that the "final and critical issue presented by this case is what an objectively reasonable police officer would do once he had located Mrs. Hegarty and there was no immediate danger of harm to the other officers." Petition at 25. The Petitioner uses this incorrect statement of the legal standard as a lead-in to a discussion of his expert's criticisms of the conduct of the police officers. The issue is decidedly *not* whether an objectively reasonable police officer could have or might have behaved differently under the circumstances. Instead, the correct analysis is as follows:

> [T]he court should ask whether the agents acted reasonably under settled law in the circumstances, not whether another reasonable, or more reasonable, interpretation of the events can be constructed five years after the fact.

Hunter v. Bryant, 502 U.S. 224, 228 (1991). The Court of Appeals carefully considered the opinions of the Petitioner's expert and rationally concluded that the opinions did not alter the objective legal reasonableness analysis. *Hegarty*, 53 F.3d at 1375-1378.

The Court of Appeals applied the correct standard both in considering the record for summary judgment purposes and in identifying the material facts in the context of the qualified immunity issue. Any distortion of the record in this matter has occurred, not at the hands of the three Judges sitting in Boston, but at the hands of the Petitioner.

CONCLUSION

Because the District Court's denial of the Respondents' motion for summary judgment *did not* determine that the record set forth a genuine issue for trial, and because in fact there is no genuine issue for trial on the qualified immunity defense, the decision in *Johnson v. Jones*, __U.S. __, 115 S. Ct. 2151, 132 L. Ed. 2d 238 (1995) does not apply. The decision of the Court of Appeals was correct in all respects and there is no justification for further review. Respondent Gary Wright therefore respectfully requests that the Court deny the Petitioner's Petition for a Writ of Certiorari.

Respectfully Submitted,

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No. 95-629

In The

Supreme Court of the United States

October Term, 1995

JOHN M. HEGARTY, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF KATHERINE A. HEGARTY,

Petitioner,

vs.

SOMERSET COUNTY, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the First Circuit Court of Appeals correctly held, as a matter of law, that competent police officers possessing the same information the defendant officers had on May 15, 1992, reasonably could have believed that probable cause existed to arrest Katherine Hegarty and that exigent circumstances justified an immediate warrantless entry into her cabin.

LIST OF PARTIES

Pursuant to Rule 14.1(b) of the Supreme Court Rules, the parties to the proceedings below whose judgment is sought to be reviewed are:

John M. Hegarty, as Personal Representative
of the Estate of Katherine A. Hegarty, and
Individually

Petitioner.

Sergeant Wilfred Hines
Deputy Rene Guay
Reserve Deputy Thomas Giroux, Jr.
William Crawford, Jr.
State Trooper Gary Wright

Respondents.

The Petitioner has incorrectly listed Somerset Sheriff Spencer Havey as a party in his Petition. (Petition, p. ii). Spencer Havey *is not* a party to the Petition. Indeed, the Petition contains no legal argument concerning Spencer Havey's liability.

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STATEMENT OF THE CASE

The Petitioner has misstated and omitted facts that bear on the question of what issues would properly be before the Court if a Writ of Certiorari was granted. Pursuant to Supreme Court Rule 15, the Respondents will identify the Petitioner's material errors and omissions.

The Petitioner argues that the First Circuit "improperly resolved factual issues and failed to construe the record in the light most favorable to the Plaintiff." (Petition, p. 18). He asserts that the First Circuit erred by "significantly overstating" Katherine Hegarty's mental condition at the time of the underlying incident (Petition, p. 19); that the appellate court "grossly distorted" the four campers' reaction to the shots fired by Hegarty (Petition, p. 20); and that there is "substantial evidence" that Hegarty was not "distraught" or "flipped out." (Petition, p. 21). Rather, he claims that she was "justifiably upset" that the campers had camped "without permission," had "trespassed on her property," and had "started an illegal fire." (Petition, p. 21). These assertions are utterly without merit.

The truth is that the facts of this case are undisputed. They were undisputed on May 15, 1992. They were undisputed when the Petitioner filed suit. They were undisputed when the District Court rendered its decision. They were undisputed at the First Circuit Court of Appeals. The facts of this case are still undisputed. The Petitioner cannot escape this fundamental truth by distorting the undisputed evidence in this case.

A. Katherine Hegarty Shoots At The Campers

During the morning of May 15, 1992, four campers arrived at their campsite and set up camp. App. at 1001a. At around 9:00 that evening, Katherine Hegarty became extremely upset when

she saw the campers returning to their campsite for the night. App. at 1222a. She accused them of trespassing on her property and of scaring her birds and animals. App. at 571a, 600-01a, 1222a. The campers assured her that they had permission to camp on the paper company's property. App. at 1222a.

The campers told Hegarty that they would leave first thing in the morning. Hegarty told them that they could leave "only if I let you leave." App. at 572a, 601a, 614a. She then started shooting at them. App. at 1223a. Hegarty would shoot five or six rounds at the campers, go into her cabin, turn the lights on, reload, turn the lights off, go back outside and shoot five or six more rounds at them. App. at 572-73a. She repeated this process five or six times. App. at 1223a.

The campers thought that Hegarty was using both a rifle and a pistol and that she might have been drinking. App. at 572-73a, 601a, 613a. She shot at the campers for approximately 1 to 1-1/2 hours. App. at 219a. When Hegarty started shooting, the campers were in front of their lantern by a fire. App. at 572a. Three of them took cover behind their truck, the other behind the stream bank. App. at 601a. Throughout this time, Hegarty was either talking to herself or someone else in the cabin. App. at 572a.

The campers were eventually able to figure out Hegarty's reloading pattern. App. at 1223-24a. On one occasion when she went into the cabin to reload, the campers jumped into their truck and sped down the Holeb Road. App. at 613-14a, 1224a. As the campers passed by the Hegarty cabin at a distance of approximately 50 or 60 feet, Hegarty came out, stood on the front porch and pointed a rifle at them. App. at 573a, 601a, 614a. They could not tell if Hegarty shot at them as they drove by her cabin because they were travelling "unbelievably fast." App. at 573a, 601a, 614a, 1224a. The noise caused by the truck might have covered up the sound of a gunshot. App. at 573-74a, 601a, 614a.

After the campers sped past the Hegarty cabin, she got into her own vehicle and pursued them down the Holeb Road. App. at 573a, 613-14a. The campers were "scared to death" when they had to get out of their truck and unfasten a cable strung between two stone pillars as Hegarty continued to pursue them. App. at 573-74a. The campers then retreated to a truck stop located on Route 201. App. at 670a.

B. The Campers' Call For Help

At the truck stop, one of the campers called the Somerset County Sheriff's Department and told the dispatcher that "we got a lady shooting *at us* in the woods." App. at 668-72. (emphasis added). He told the dispatcher that he and his companions had been at a campsite that was "registered with the State." *Id.* He went on to explain that he had "no idea if she is following us," but that she had a "loaded gun," that she was "drunk" and "flipped right out." *Id.*

Deputy Rene Guay of the Somerset County Sheriff's Department was in his cruiser in Bingham, Maine, when he received an urgent radio call from his dispatcher concerning the camper's complaint. App. at 241-42a. The dispatcher told Guay that a woman had fired approximately 30 bullets at four campers and that they had fled to a truck stop in Jackman, Maine. App. at 600a. The dispatcher also told Guay that the campers feared that the woman who shot at them would follow them to the truck stop. App. at 242a, 600a.

Guay asked the dispatcher to send Somerset County Reserve Deputy Tommy Giroux to the truck stop and that Guay would meet him there. App. at 242a, 600a. Guay then called Maine State Trooper Gary Wright by radio and requested his assistance with the complaint. App. at 575a. Sergeants Wilfred Hines and William Crawford of the Sheriff's Department were also

instructed to respond to the camper's complaint. App. at 192a, 571a, 588a.

C. The Officers Respond To The Campers' Call

Giroux, who lived 1-1/2 miles from the truck stop, went there and interviewed the campers until the other officers arrived. App. at 77a, 611a, 613a. After the campers described for him the location of the camp and the woman who did the shooting, Giroux concluded that the woman was Katherine Hegarty. App. at 76a, 245a, 612a. Hegarty lived on the Mill Road in Jackman, and Giroux had known her for 14 years on a first-name basis. App. at 612-13a. She was a registered Maine Guide with a reputation as a "crack shot." App. at 78a, 612a.

When Deputy Guay got to the truck stop, the campers were inspecting a boat on the pick-up truck for bullet damage. App. at 612a, 613a. They thought that a mark on the bow might have been caused by a bullet. App. at 572a, 602a. The campers were visibly frightened. App. at 76a, 612a. Sgt. Wilfred Hines and Trooper Wright arrived a short time later. App. at 571a, 614a, 615a. Crawford called the officers at the truck stop by radio and arranged to meet them at the intersection of Route 201 and the Holeb Road. App. at 588-89a. That intersection was approximately 1 to 1-1/2 miles from the truck stop and 3.1 miles from Hegarty's cabin. The Holeb Road was an unimproved dirt road. App. at 615a.

Giroux briefed Hines, Guay and Wright on what the campers told him Hegarty did. App. at 571a, 600a, 614-15a. Hines was the senior Somerset County officer at the scene. App. at 571a. Guay and Giroux told the other officers that they were certain that Katherine Hegarty did the shooting. App. at 245a, 574a, 601a, 614-15a. Trooper Wright told the other officers that he had dealt with Hegarty before, that she knew how to use a gun, and that she could be violent and extremely aggressive. App. at 575a.

D. The Officers Interview The Campers

Giroux, Guay and Hines interviewed the four campers as a group. App. at 571a, 600-01a, 613a. The campers told the officers about the shooting and that they were afraid that Hegarty would pursue them to the truck stop. App. at 245a. Guay and Giroux were very familiar with the area the campers described. App. at 613a, 602a. However, all of the officers knew approximately where the campsite was located. App. at 571-72a, 602a. It was on paper company property a "stone's throw" from Hegarty's cabin. App. at 613a.

The campers told the officers that there were other campers in the area. App. at 1233a. They did not know for sure if there was anyone else near the Hegarty cabin on the opposite side of Sandy Stream. App. at 204-05a, 574a. Guay knew of at least one other campsite on the other side of Sandy Stream close to where the four campers had been camping. App. at 602a. Consequently, the officers concluded that they had to assume that there were other campers near the cabin. App. at 204-05a, 577-78a, 602a. Giroux knew from experience that the woods were usually "full of people" if the campsites close to Route 201 were occupied because May was a good month for trout fishing. App. at 615a.

Sgt. Hines decided to arrest Hegarty for shooting at the campers. App. at 574a, 603a. The officers concluded that Hegarty could conceivably be charged with at least the offense of reckless conduct with a firearm in violation of 17-A M.R.S.A. §§ 211 & 1252(4). App. at 574a.

Hines, Guay, Giroux and Wright were all familiar with Hegarty's history of mental instability and aggressiveness. App. at 304-06a, 575-76a, 601-02a, 612-13a. Trooper Wright had previously arrested Hegarty twice in one evening in November 1991. App. at 303-04a. Her first arrest was for operating under the

influence in Jackman. App. at 303a. When Wright arrested her, Hegarty attempted to reach for a weapon. App. at 377a, 602a. Later that same night, Hegarty showed up at Wright's house and assaulted him. App. at 304-05a, 602a.

The officers also knew that Hegarty had been involuntarily committed to a hospital for a "psychotic breakdown" in the fall of 1991, and that the EMT crew had to "gang tackle" and sedate her on that occasion. The EMT crew reportedly saw a great many firearms in Hegarty's home. App. at 306a, 576a, 612-13a.

While at the truck stop, the officers formulated a plan of action for dealing with Hegarty, which they characterized as "locate, identify, contain, negotiate and arrest." App. at 193a. Once in custody, she would be referred out for a psychological evaluation. App. at 193a.

The officers considered the possibility of a warrantless entry into Hegarty's cabin. Hines would decide if circumstances justified a warrantless entry. App. at 194a. If necessary, Hines and Wright would conduct the entry. App. at 194a. They were the most experienced officers, and they had worked closely with each other in the past. App. at 575a. A warrantless entry would be made only as a "last resort" in the event that the plan, as formulated, proved ineffective. App. at 194a. A warrantless entry would only be made at the "safest opportunity" for both the officers and Katherine Hegarty. App. at 194a.

Sgt. Hines understood that exigent circumstances would have to be present to justify a warrantless entry into the Hegarty cabin. App. at 194a. Sgt. Hines intended to tell Katherine Hegarty that she was under arrest. App. at 202a. However, he had been trained at the Maine Criminal Justice Academy not to tell a subject that they were under arrest if doing so placed the life of an officer, or some other person, in danger. App. at 219a.

After the officers completed their preparation at the truck stop, they drove to the intersection of Route 201 and the Holeb Road to await Sgt. Crawford's arrival. App. at 576a, 589a. When Crawford arrived, he was briefed on the nature of the campers' complaint, the plan of action, and told that Hegarty probably did the shooting. App. at 130-31a, 140a, 589-90a. He was warned that Hegarty was potentially violent, aggressive, and known to possess firearms. App. at 589-90a. The briefing led Crawford to conclude that Hegarty had intended to harm the campers. App. at 590a.

After Crawford was briefed, the officers drove down the Holeb Road toward the Hegarty cabin. App. at 590a, 615-16a. At that time, the County cruisers did not have radio communications with the Sheriff's Department due to the remoteness of their location. App. at 139a, 590a.

E. The Officers Walk In Toward The Cabin

The officers parked their cruisers on the Holeb Road approximately seven-tenths of a mile from the Hegarty cabin. They walked the rest of the way in on foot because Hines thought that the sight of police cruisers might provoke a violent response from Hegarty. App. at 578a, 615-16a. Trooper Wright led the way in with his police dog. The dog was brought along to alert the officers to potential danger in the event that Hegarty was outside her cabin. App. at 298-99a, 578a, 591a, 603a. Although it was after dark, it was a clear night and there was a full moon. App. at 577a. The officers observed a number of occupied campsites along the Holeb Road. App. at 577a, 616a.

When the officers reached the vicinity of the Hegarty cabin, they did not know where Hegarty was, and they were unable to determine if there was anyone else within eyesight of the cabin. App. at 577-78a. The cabin lights were off, and they could not see

anyone inside. App. at 603-04a. The area around the cabin was wide open, and Canadian music could be heard playing loudly on a radio. App. at 205a.

Giroux took a position behind a tree 91 feet from the front of the cabin. App. at 90a, 111a, 616a. Wright and Crawford went to the right side of the cabin. Hines and Guay went to the left side. App. at 578-79a, 591-93a, 616a. Once the officers were in position, Giroux repeatedly shouted words to the effect of "Kathy Hegarty, this is Tommy Giroux, I'd like to speak with you. Please open the door so that I can talk to you." App. at 616a. He shouted to Hegarty for what seemed like a "long time" without any response. App. at 617a.

Hines eventually took up a position on the front porch of the cabin near the door. Trooper Wright stood to his right. App. at 209a, 578-79a. Hines knocked repeatedly on the cabin door with his flashlight and identified himself by name as a law enforcement officer. App. at 579a. He told Hegarty that he wanted to speak with her, and he asked her to come to the door. App. at 579a.

Crawford checked a pickup truck in the front yard to ensure that no one was in it, after which he checked the perimeter of the cabin. App. at 591-92a. After completing his first check, Crawford told Hines that he would recheck the windows on the left side of the cabin. App. at 592a. Crawford could hear Giroux repeatedly identifying himself and asking Hegarty to exit the cabin. App. at 591-92a. He told Giroux that anyone inside the cabin might not be able to hear him because the radio was playing so loudly. App. at 144a. Giroux thereafter took up a position behind the pick-up truck 23 feet from the front of the cabin. App. at 91a.

F. Hegarty's Behavior at the Cabin

When Crawford shined his flashlight into a window on the left side of the cabin, Hegarty pointed a rifle "right in [his] face." App. at 144-45a, 592-93a. Scared, he dropped to the ground and yelled, "Don't go in. She's got a gun." App. at 145a, 593a. All the officers heard Crawford's warning. App. at 309-10a, 579-80a, 604a, 617a.

After Crawford dropped to the ground, he heard Hegarty ask, "[W]ho are you?" App. at 145a. The radio then became inaudible. App. at 145a. Crawford, who was in full uniform, identified himself by name as a law enforcement officer and replied, "Kathy, we want to talk to you." App. at 145a, 147a. Meanwhile, Giroux continued calling to Hegarty, and Crawford heard her walk to the front of the cabin. App. at 145a. Crawford stayed put and attempted to regain his composure because he was "scared to death." App. at 146a.

After hearing Crawford's warning, Hines feared that Hegarty might use her weapon against the officers. App. at 579a, 582a. He concluded that it would not be safe for the officers to retreat from the cabin because the area around it was wide open, there was no cover readily available, and it was a bright moonlit night. App. at 258a, 579-80a. If they retreated, they would be clear targets for anyone inside the cabin. App. at 579-80a. Hines concluded that the officers had to stay next to the cabin where they were partially concealed. However, the cabin walls were very thin, and Hines was afraid that they could be shot directly through the cabin walls. App. at 580a.

Hines never told Hegarty that she was under arrest because he "did not want to get shot through thin camp walls." App. at 202a. By this time, Hines was very concerned about Hegarty's "mental stability." App. at 219a. The decision not to tell Hegarty

that she was under arrest was not a joint decision by the officers. App. at 219a.

Giroux continued encouraging Hegarty to talk to him. App. at 617-18a. When Hegarty asked Giroux what his intentions were, he said, "Katherine, you know me long enough that my intentions are honorable." App. at 91-92a, 256a. Giroux was certain that Hegarty knew he was there. App. at 92a, 618a. Guay, who also knew Hegarty, identified himself, told Hegarty to turn the lights on, to leave the cabin, and told her that he was concerned for her well being. Hegarty responded by making unusual sounds and laughing "like a witch." App. at 604-05a.

Earlier that night, Trooper Wright told the other officers that he had received a complaint from Augusta dispatch concerning burglaries in the Crocker Pond area. App. at 256a, 605a. Crocker Pond was near the Hegarty cabin. App. at 605a. Guay told Hegarty that the officers were investigating camp burglaries and that they had reason to believe that she might have seen someone that night. Hegarty told Guay that she had not seen anybody. App. at 256a, 580-81a, 605a, 618-19a.

After a short time, Hegarty said to Guay in a sing-song voice words to the effect of, "I can see you." App. 605-06a. While she spoke to Guay, Hegarty was kneeling on a couch with her face pressed up against the front window. She smiled at Guay with an unusual expression on her face. Guay shined his flashlight in the cabin window, thereby illuminating Hegarty's face and her immediate surroundings. App. at 256-58a, 605-06a.

All four of the Somerset Officers at the scene identified themselves by name as law enforcement officers to Katherine Hegarty. App. at 92-93a. All of them were in uniform that clearly identified them as law enforcement officers. App. at 214a. Guay was wearing a jacket with a badge on the front, arm patches, and a tan shirt with a badge on it. App. at 82a, 212a, 252a.

G. The Warrantless Entry by Sergeant Hines

The officers continued their attempts to communicate with Hegarty to no avail. App. at 257a, 605-06a. They repeatedly asked Hegarty to turn the lights on, to exit the cabin, and told her that it was safer for everyone if she complied with their instructions. App. at 257a, 606a. They repeatedly told her that it was safer for her and the officers if she did that. Hegarty responded by laughing "like a witch." App. at 580a, 593a, 606a, 617-19a.

From a side window, Crawford saw Hegarty kneeling on the couch looking out the front window at Deputy Guay. No weapon was in sight. App. at 594a. Guay also checked the area around Hegarty, and he did not see a weapon either. App. at 606a. Guay feared that Hegarty might go back into the room where he thought the weapon was located. App. at 606a. Not seeing a weapon, he said to Sgt. Hines, "she doesn't have a gun, go." App. at 582a, 594a, 606a, 619a.

Given his training, education and experience, Sgt. Hines concluded that both probable cause and exigent circumstances justifying a warrantless entry into Hegarty's cabin existed on May 15 and 16, 1992. App. at 584-85a. Believing there was an opportunity to safely separate Hegarty from her weapons and arrest her, Hines pulled open the screen door to the cabin and repeatedly kicked the front door. App. at 582a. A chain lock kept the door from opening all the way. App. at 582a. The door case split, causing the door to spring back so that it almost closed. App. at 582a.

H. Hegarty's Threat of Deadly Force

As Hines attempted to enter the cabin, Guay saw Hegarty get up off the couch, pick up a rifle, and begin walking backward

while looking toward the door. Her left hand was on the rifle forebarrel, her right hand was on the stock and trigger, and she began raising the rifle toward the doorway. App. at 259-60a, 607a.

When Guay saw Hegarty pick up the rifle, he yelled, "She's got a gun. Don't go." App. at 258a, 583a, 607a, 619a. However, Hines was already part-way into the cabin. App. at 216a, 583a. Hines saw Hegarty smiling and standing in a "shooting stance" with the rifle. App. at 216a. Trooper Wright was standing behind him to his right. App. at 583a. Hegarty raised the rifle toward Hines with her finger inside the trigger guard. App. at 583a.

Guay and Hines repeatedly ordered Hegarty to "[P]ut the gun down, put it down, put it down." App. at 260a, 583a, 596a, 607-08a, 619a. When Hegarty's rifle was aimed directly at the center of Hines' chest, and only after she did not comply with the officers' orders to "put the gun down," Hines and Wright fired their sidearms. Thinking that Hegarty was about to shoot Hines and Wright, Guay shot Hegarty through the cabin window. App. at 607-08a. All three officers fired at the same time. Crawford and Giroux heard what sounded like a single gunshot. App. at 152-53a, 583a, 596a, 608a, 619a.

Immediately after the shots were fired, Trooper Wright went into the cabin and checked Hegarty for vital signs. He found none. Hegarty was lying on the cabin floor with a smile still on her face. The rifle was lying across her chest. App. at 584a, 596a, 608a, 619a. After the shooting, all of the officers were upset. Hines remarked, "[W]hy didn't she just put the goddamn gun down." App. at 315a. When daylight came, the officers checked the campsite used by the four campers. Their equipment had been thrown into the stream, and some of it had bullet holes in it. Personal property belonging to the four campers was found in Hegarty's cabin. App. at 584a.

As of May 15, 1992, Hines, Guay, Crawford and Giroux all satisfied the educational and training requirements established by the Maine legislature in 25 M.R.S.A. § 2801 *et. seq.* for full-time and part-time deputy sheriffs. App. at 560a. The number of training hours they had received *exceeded* the national average. App. at 401a. Coincidentally, Crawford and Hines had attended a training session on firearms and deadly force just prior to going to the Hegarty cabin. App. at 126-27a. None of the Somerset Deputies had ever been the subject of a civilian complaint concerning a warrantless entry or a substantiated claim involving the use of excessive force. App. at 566a.

SUMMARY OF ARGUMENT

I. This case does not present any issue appropriate for the Court's exercise of its discretionary jurisdiction. It merely challenges the appellate court's application of law to the undisputed facts.

II. Even if the Court determined that *Johnson v. Jones* applied retroactively to this case, the First Circuit's decision granting the defendant officers qualified immunity was proper.

REASONS FOR DENYING THE WRIT

The Petitioner has not satisfied the criteria traditionally applied by the Court in determining whether to grant a Writ of Certiorari. The First Circuit Court of Appeals correctly applied the law of qualified immunity to the undisputed facts in this case when it concluded, as a matter of law, that competent police officers, possessing the same information the defendant officers had on May 15, 1992, reasonably could have believed that probable cause existed to arrest Katherine Hegarty and that exigent circumstances justified an immediate warrantless entry into her cabin.

I.

THE FIRST CIRCUIT CORRECTLY APPLIED THE CONTROLLING PRECEDENTS WHEN IT HELD, AS A MATTER OF LAW ON THE UNDISPUTED MATERIAL FACTS, THAT THE CONDUCT OF THE DEFENDANT OFFICERS WAS OBJECTIVELY REASONABLE.

A. The Standard of Review for the Officers' Immunity Claims

On a motion for summary judgment where qualified immunity is asserted, the relevant inquiry is whether "a reasonable official *could have believed* his actions were lawful in light of clearly established law and the *information the official possessed at the time of his allegedly unlawful conduct.*" *Febus-Rodriguez v. Betancourt-Lebron*, 14 F.3d at 91 (citations omitted) (emphasis added). As a predicate to this inquiry, a plaintiff must establish that a particular defendant violated the plaintiff's federally protected rights. *Id.*

The mere existence of some factual dispute will not frustrate an otherwise proper summary judgment. *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 247, 106 S. Ct. 2505, 2509, 91 L. Ed. 2d 202 (1986). The preliminary question for the Court is "whether there is any evidence] upon which a jury could properly proceed to find a verdict for the party producing it upon whom the onus of proof is imposed." *Id.* at 251, 106 S. Ct. at 2511 (citation omitted).

A district court's denial of a claim of qualified immunity is an appealable "final decision" within the meaning of 28 U.S.C. § 1291 "to the extent that it turns on an issue of law." *Febus-Rodriguez v. Betancourt-Lebron,* 14 F.3d 87, 90 (1st Cir. 1994). Since a defendant's entitlement to qualified immunity is a question of law in this context, appellate review is plenary. *Id.*

The appellate assessment of a qualified immunity claim has two analytic components. First, the Court must determine whether the plaintiff's rights were "clearly established" at the time of the alleged constitutional violation. *See Harlow*, 457 U.S. at 818, 102 S. Ct. at 2738. If the plaintiff's asserted right was "clearly established," the Court is required to assume that the right was recognized by the defending official. *Id.* Second, the Court must determine if a "reasonable official," situated in the same circumstances, should have understood that the challenged conduct violated that clearly established right. *See Anderson v. Creighton*, 483 U.S. 635, 640-41, 107 S. Ct. 3034, 3039, 97 L. Ed. 2d 523 (1987).

B. The Qualified Immunity Doctrine

Qualified immunity protects governmental officials exercising discretionary powers "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 2738, 73 L. Ed. 2d 396 (1982). This doctrine protects "all but the plainly incompetent or those who knowingly violate the law." *See Hunter v. Bryant*, 502 U.S. 224, 229, 111 S. Ct. 534, 537, 116 L. Ed. 2d 589 (1991) (citation omitted).

Whether a defendant actually violated a plaintiff's federally protected rights is not the central issue in the qualified immunity context. "Even defendants who violate constitutional rights enjoy a qualified immunity that protects them from liability for damages unless it is further demonstrated that their conduct was unreasonable under the applicable standard." *Davis v. Scherer*, 468 U.S. 183, 190, 104 S. Ct. 3012, 3017, 82 L. Ed. 2d 139 (1984).

With respect to Fourth Amendment claims brought pursuant

to 42 U.S.C. § 1983, the "reasonableness" of a particular use of force "must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Graham v. Connor,* 490 U.S. 386, 396, 109 S. Ct. 1865, 1872, 104 L. Ed. 2d 443 (1989). "The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments — in circumstances that are tense, uncertain, and rapidly evolving — about the amount of force that is necessary in a particular situation." *Graham v. Connor,* 490 U.S. 386, 396-97, 109 S. Ct. 1865, 1872, 104 L. Ed. 2d 443 (1989). This "reasonableness" inquiry is an objective one. *Id.* The question, then, is "whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them." *Id.* (emphasis added).

1. *Probable Cause*

The Petitioner asserts, contrary to the undisputed evidence, that the defendant officers concluded that Katherine Hegarty "had not intended to hit the campers" when she shot at them because she "could have hit them if she had really wanted to." (Petition, p. 5). This assertion is patently incorrect. The evidence is that the officers had probable cause to arrest Hegarty for at least one felony.

Under Maine law, a "[a] person is guilty of reckless conduct if he recklessly creates a substantial risk of serious bodily injury to another person." 17-A M.R.S.A. § 211. The First Circuit correctly determined that an objectively reasonable officer could have concluded that Hegarty could be arrested for this offense.

As the Court has observed: " 'In dealing with probable cause, . . . as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent

men, not legal technicians act.' " *Illinois v. Gates,* 462 U.S. 213, 231, 103 S. Ct. 2317, 2328, 76 L. Ed. 2d 527 (1983) (quoting *Brinegar v. United States,* 338 U.S. 160, 175, 69 S. Ct. 1302, 1310, 93 L. Ed. 1879 (1949)).

The campers told the defendant officers that Hegarty appeared mentally unbalanced and that she had been drinking. Given this information, an objectively reasonable officer could have concluded that Hegarty "missed" the campers precisely because she was intoxicated or mentally unstable. Common sense tells us that either one of these conditions can adversely impact upon the accuracy of someone's aim.

Furthermore, the campers took "cover" when Hegarty shot at them. The idea behind taking "cover" is to avoid being hit by a bullet. It was entirely reasonable for the officers to conclude that the campers had not been hit by a bullet precisely because their "cover" proved effective. The fact that the campers were compelled to seek "cover" when Hegarty shot at them, without more, demonstrates that she did intend to harm them. If the campers had believed they were not in danger, there would have been no reason for them to seek "cover" in the first place. The undisputed evidence is that the campers feared being shot by Hegarty. In fact, they were still visibly frightened when the officers interviewed them.

2. *Exigent Circumstances*

The Petitioner challenges the First Circuit's conclusion that a competent police officer "reasonably could have believed" that there existed probable cause to arrest Hegarty and that exigent circumstances justified an immediate warrantless entry into her cabin. (Petition, p. 18). The First Circuit rejected this argument. The Court must reject it as well.

Exigent circumstances exist when there is a "compelling necessity for immediate action that [would] not brook the delay of obtaining a warrant." *United States v. Almonte*, 952 F.2d 20, 22 (1st Cir. 1991), *cert. denied*, 503 U.S. 1010, 112 S. Ct. 1776, 118 L. Ed. 2d 434 (1992) (quoting *United States v. Adams*, 621 F.2d 41, 44 (1st Cir. 1980)).

In *Anderson v. Creighton*, this Court made the following observation about the standard governing summary judgment in a qualified immunity case involving probable cause and exigent circumstances:

> We have recognized that it is inevitable that *law enforcement officials will in some cases reasonably but mistakenly conclude* that probable cause is present, *and we have indicated that* in such cases *those officials* — like other officials who act in ways they reasonably believe to be lawful — should not be held personally liable. *See Malley [v. Briggs*, 475 U.S. 335], at 344-345 [106 S. Ct. 1092, at 1097-98, 89 L. Ed. 2d 271 (1986)]. *The same is true of their conclusions regarding exigent circumstances*. . . .

483 U.S. at 641, 107 S. Ct. at 3039-40 (emphasis added).

In essence, the resolution of the exigent circumstances inquiry by the Court depends upon the answers to two questions. First, what did the officers know? Second, when did they know it?

This is *what* the officers knew: that the four campers had camped on paper company property at a "registered" campsite, that Hegarty fired 30 bullets at them without provocation or justification, that her conduct toward them made the campers

think she was "wigged right out" and "flipped out," (App. at 1223a, 1233a), that she shot at the campers for over an hour, and that the campers were able to escape only by driving away "unbelievably fast" in their truck. App. at 1224a.

The officers knew that Hegarty chased the campers in her truck, that they were "scared to death" by the shooting, that they sought refuge at a truck stop, that they placed an urgent call to the Somerset Sheriff's Department for help, and that the campers were still visibly frightened when the officers interviewed them.

The officers knew that Hegarty was a registered Maine Guide with a reputation as a "crack shot," that she possessed a great many firearms, that she had a history of violence and aggressiveness toward law enforcement, that she had been involuntarily committed to a hospital for a psychotic breakdown, and that an EMT crew had to "gang tackle" and sedate her before she could be hospitalized.

The officers knew that Trooper Gary Wright had arrested Hegarty twice in one night during November 1991, that she was intoxicated when he arrested her, that she reached for a weapon in her vehicle during that arrest, that she had several weapons in her vehicle at that time, that she assaulted Trooper Wright at his house later that same night, and that she acted irrationally and made "animal noises" for an hour and a half when Deputy Guay drove her to jail after Wright arrested her.

The officers knew that Hegarty was last seen outside her cabin in a truck, that she pointed a weapon at Crawford's face at the cabin, that she committed a criminal offense when she pointed the weapon at him, that prior to that time they did not know that she was in the cabin, that they repeatedly identified themselves to Hegarty, that she personally knew two of the officers at the scene, that she refused to communicate with them despite their repeated

attempts, that she "laughed like a witch" in response to their questions, that she denied seeing anyone earlier that night, and that she refused their orders to turn the cabin lights on and exit the cabin.

The officers knew that the area around Hegarty's cabin was wide open with no cover available, that the cabin walls were "paper thin," that they could be seen in the moonlight if they attempted to retreat from the cabin, that they would have made clear targets for Hegarty if they had retreated, and that they could be shot through the cabin walls.

All of the factual information set forth above was known to the officers *before* Sergeant Hines initiated a warrantless entry in an attempt to safely separate Hegarty from her firearms. In summary, the officers knew that Hegarty was unpredictable, mentally unstable, potentially violent and quite capable of killing them. A warrantless entry was *the only* objectively reasonable option available to the officers under the circumstances confronting them on May 15, 1992.

II.

EVEN IF THE COURT DETERMINED THAT *JOHNSON V. JONES* APPLIED RETROACTIVELY TO THIS CASE, THE FIRST CIRCUIT'S DECISION GRANTING THE DEFENDANT OFFICERS QUALIFIED IMMUNITY WAS PROPER.

The Petitioner makes much of the Court's opinion in *Johnson v. Jones*, __ U.S. at __, 132 L. Ed. 2d 238 (1995). That opinion did nothing to alter the substantive law of qualified immunity. It dealt with the *circumstances* under which an immediate appeal will lie from the denial of a pre-trial motion asserting a qualified immunity defense. Even if the Court held

that *Johnson* was retroactively applicable to the instant case, the First Circuit's decision granting the officers qualified immunity was proper.

The plaintiff in *Johnson* brought a Section 1983 action against five police officers, claiming that they used excessive force when they arrested him and beat him at the police station. *Johnson*, 132 L. Ed. 2d at 243. Three of the defending police officers moved for summary judgment, arguing that the plaintiff could point to no evidence that they had beaten him or been present while two other officers did so. *Johnson*, 132 L. Ed. 2d at 243.

The plaintiff in *Johnson* rebutted the argument made by the three officers by pointing to his own deposition testimony and the deposition testimony of the three officers. *Johnson*, 132 L. Ed. 2d at 243. The plaintiff testified that the officers *had* used excessive force when they arrested him and later in the booking room at the police station. *Id.* The three officers testified that they *were* present at the scene of the arrest and in or near the booking room when the plaintiff was there. *Id.*

The district court in *Johnson* denied the officers' motion for summary judgment, noting Seventh Circuit precedent that indicated potential liability if the three officers " 'stood by and allowed others to beat the plaintiff.' " *Johnson*, 132 L. Ed. 2d at 243. Accordingly, the district court concluded that the record contained enough circumstantial evidence to support the plaintiff's theory of the case. *Id.*

The three police officers in *Johnson* immediately appealed the district court's denial of their motion for summary judgment, arguing, in relevant part, that the denial was improper because the record did not contain " 'a scintilla of evidence . . . that one or more' of them had 'ever struck, punched or kicked the plaintiff,

or ever observed anyone doing so.' " *Johnson*, 132 L. Ed. 2d at 243. The Seventh Circuit held that it lacked appellate jurisdiction over the officers' evidentiary argument that " '[they] didn't do it.' " *Id.* It therefore implicitly found that there was enough circumstantial evidence introduced by the plaintiff to raise "genuine issues" of "material fact" for trial. *Johnson*, 132 L. Ed. 2d at 243.

This Court granted certiorari to resolve a split in the circuits concerning the immediate appealability of " 'evidence insufficiency' claims made by public official defendants who assert qualified immunity defenses." *Johnson*, 132 L. Ed. 2d at 244. The Court affirmed the Seventh Circuit's ruling and held

> that a defendant, entitled to invoke a qualified immunity defense, may not appeal a district court's summary judgment order insofar as that order determines whether or not the pretrial record sets forth a "genuine" issue of fact for trial.

Johnson, 132 L. Ed. 2d at 251.

The *Johnson* case stands for two simple propositions: First, if a summary judgment order determines that the pretrial record sets forth a genuine issue of material fact, a defending official claiming qualified immunity is *not* entitled to an immediate interlocutory appeal on demand. Second, if a summary judgment order determines *what* the facts *demonstrate* under "clearly established law," a defending official is entitled to an immediate interlocutory appeal. *See Stella v. Kelley*, 63 F.3d 71, 74 (1st Cir. 1995).

The application of *Johnson* to the instant case changes nothing. The First Circuit decided a legal issue on undisputed

facts when it concluded that the defendant officers in this case were entitled to qualified immunity. Simply stated, the instant case does not involve a "sufficiency of the evidence" issue like the one raised in *Johnson.* In *Johnson* the police officers claimed that "we didn't do it." *Johnson,* 132 L. Ed. 2d at 243. In the instant case, the defendant officers acknowledged that "they did do it." The only issue before the First Circuit was whether their conduct was objectively reasonable.

The First Circuit properly concluded, on the *undisputed* evidence, that the conduct of the defendant officers was objectively reasonable. That legal determination must remain undisturbed. Only through the exercise of impermissible judicial hindsight could the Court conclude that the conduct of the defendant officers was not objectively reasonable. The doctrine of qualified immunity is designed to prevent this type of judicial second-guessing.

CONCLUSION

For the reasons set forth above, and for the reasons set forth in the Opinion of the First Circuit Court of Appeals, the Petitioner's request for a Writ of Certiorari must be denied.

Respectfully submitted,

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No. 95-629

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

JOHN M. HEGARTY, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF KATHERINE A. HEGARTY,
Petitioner,

v.

SOMERSET COUNTY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the First Circuit

REPLY BRIEF OF PETITIONER

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INTRODUCTION TO ARGUMENT

Respondents (defendants) raise three points in their Briefs in Opposition to the Petition for Certiorari (Ptn.). They argue that petitioner (plaintiff) has "distorted" the record in order to assert that there are disputed issues of material fact which should not have been resolved by the First Circuit. They also argue that there are no disputed issues of material fact and that both the District Court and the First Circuit applied legal rules to an undisputed record, the District Court erroneously and the First Circuit correctly and that *Johnson v. Jones*, ___ U.S. ___, 115 S. Ct. 2151, 132 L. Ed. 2d 238 (1995) does not apply to this case because it does not present any factual issues.

ARGUMENT IN REPLY

I. THE JOHNSON RULE MUST BE APPLIED TO THIS CASE.

Plaintiff has argued that his Petition for Certiorari should be granted because the First Circuit Court of Appeals failed to apply the rule against immediate appeals promulgated in *Johnson v. Jones* to this case. Defendants respond that *Johnson* does not apply because this case presents no disputed issues of material fact. Plaintiff has already shown in the Petition that there are genuine and material issues of fact which are disputed in this case. *See* Ptn. at 16-25. These issues are not different from the fact issues presented in *Johnson*. Whether these defendants had enough reliable information about Katherine Hegarty's emotional state to use it as a factor in deciding to forcibly enter her cabin minutes after they arrived there and shoot her to death is a fact question in the same way as whether the defendants in

Johnson did or did not beat the plaintiff or did or did not stand by while he was being beaten. *See* Sec. III, *infra*.

In *Johnson*, this court held that such issues could not be immediately appealed in qualified immunity cases because they were issues of fact. *See Johnson*, 115 S. Ct. at 2165. In *Stella v. Kelley*, 63 F.3d 71, 74 (1st Cir. 1995) the First Circuit explicated *Johnson's* holding as follows:

> The bottom line, then, is simply this: a summary judgment order which determines that the pretrial record sets forth a genuine issue of fact, as distinguished from an order that determines whether certain given facts demonstrate, under clearly established law, a violation of some federally protected right, is not reviewable on demand.

Because *Johnson* is retroactive, *id.*, it applies to this case, which was pending before the Court of Appeals when *Johnson* was decided. Because the record contains disputed issues of material fact, the First Circuit should have dismissed the defendants' appeal and remanded the case to the District Court for further proceedings. It erred in failing to do so and that error so seriously affected the plaintiff's rights that this Court should reverse it.

II. PLAINTIFF HAS NOT DISTORTED THE RECORD.

All the defendants allege that plaintiff has misrepresented the record by characterizing as fact assertions which are not supported by the record. A review of some of the specific examples given by Defendant Wright

demonstrates that plaintiff's characterization of the record is more accurate than defendants'. For example, Wright asserts at page10, footnote 7 of his brief [Wright Br.] that "[t]he Petitioner's assertion that Hegarty acknowledged to the officers that men had been around but that she could not describe them is without record support." At page 1152 of the Joint Appendix (J.A.), Trooper Wright says, in a statement made to the Attorney General's investigator, that Mrs. Hegarty said to the officers, "'Yeah, I know there were guys around, but they're not around any more,' or something to that effect." Wright goes on to say that "We, we asked her if she could describe them to us . . . and she said, 'No, I didn't see them that close,' or something like that, 'But they're gone now,' or words to that effect." *Id.* This is clear record support for the fact that Mrs. Hegarty had indeed told the officers that she had seen the men they were allegedly looking for.

The record also supports plaintiff's statement that Mrs. Hegarty had come into the front room of the cabin unarmed. *See* Wright Br. at 9 n. 8 (". . . no evidence exists that Hegarty walked into the front room unarmed."). In his deposition , Deputy Crawford stated that, when he looked into the front room from behind Mrs. Hegarty, he could not see the gun which she had had in the bedroom. J.A. 148. At that time, he could not see a gun either in her hands or "anywhere in her immediate vicinity." *Id.*

Finally, defendant Wright argues that there was no record support (or citation) for plaintiff's statement that "no officer believed she posed any immediate danger", Ptn. at 7, when she was kneeling by the front window. Wright Br. at 11 n. 10. This is also an inaccurate characterization of plaintiff's statement, which is also supported by the record

citations at the end of that paragraph. In his deposition, Deputy Giroux specifically testified that, at that time, Katherine Hegarty did not pose a threat of immediate danger either to him or to any of the other officers. J.A. 95. Officer Guay responded similarly. J.A. 257.

Plaintiff believes that while these are minor factual points, they give the lie to the defendants' assertions that various facts cited in the Petition are not supported in the record. Defendants' argument on this point is evidently intended to buttress its main contention: that, as to material facts, the record is undisputed and that it was not therefore error for the Court of Appeals to decide the case as a matter of law. The existence of record support for plaintiff's version of the events in question supports plaintiff's position that there are unresolved issues of fact as to critical questions such as the nature of Mrs. Hegarty's emotional state on the night she died and the officers' knowledge of it, how important it was for the officers to locate her, and whether it was necessary for the officers to forcibly enter her cabin so soon after locating her. *See* Petition at 19-27.

Plaintiff is confident that review of the entire record will show that, if any parties have distorted the record, it is the defendants, whose stubborn insistence that the critical facts are undisputed goes well beyond what even a zealous advocate may argue.

III. THERE ARE DISPUTED ISSUES OF MATERIAL FACT WHICH SHOULD NOT HAVE BEEN DETERMINED ON SUMMARY JUDGMENT.

Defendants' main argument is that this Court should not review this case because its material facts are undisputed, and the Court of Appeals properly found for defendants as a matter of law. Defendants further argue that both lower courts recognized that the facts were undisputed but that the District Court erred in applying the law to the facts.

These arguments mischaracterize the District Court's analysis and proceed from an overly narrow view of what constitutes a material issue of fact.

Defendants' argument incorrectly analyzes the District Court's opinion. In that opinion, the court resolved all disputed issues of fact in plaintiff's favor, as required by summary judgment practice, and concluded that the defendants' motions for summary judgment must be denied because they were not entitled to judgment as a matter of law. *Hegarty v. Somerset County*, 848 F. Supp. 257, 264 (D. Me. 1994); Appendix (App.) to Ptn. at 43a. This is not the same as entering summary judgment *for* plaintiff on these issues, and resolving disputed fact issues in plaintiff's favor for the limited purpose of deciding a motion for summary judgment is not the same as resolving them as a factfinder. Accurate characterization of the District Court's opinion demonstrates that at least that court correctly viewed this as a case involving unresolved and disputed issues of fact.

The fact that the District Court did not resolve the disputed factual issues also establishes that the Court of Appeals erred in reviewing the District Court's judgment by

reviewing the record and resolving the factual disputes rather than construing the record "in the light most hospitable to the party opposing summary judgment, including all reasonable inferences in that party's favor." *Griggs-Ryan v. Smith*, 904 F.2d 112, 115 (1st Cir. 1990). This is precisely the type of error which this Court sought to remedy in promulgating the *Johnson* rule. This Court recognized in *Johnson* that the Courts of Appeals should not become factfinders in qualified immunity cases because they do not have the expertise nor are summary judgment records sufficiently developed for such factual review. *Johnson*, 115 S. Ct. at 2157.

The second major flaw in the defendants' argument that there are no material facts in dispute is that it is simply inaccurate under a proper definition of disputed material fact.

In his Petition for Reconsideration to the First Circuit and his Petition for Certiorari to this Court, plaintiff has argued that the First Circuit improperly resolved disputed issues of fact regarding Mrs. Hegarty's emotional state on the night she was killed. Plaintiff believes that this issue presents a genuine fact dispute because plaintiff presented expert evidence that, even assuming that Mrs. Hegarty was emotionally or psychologically overwrought that night, the officers still acted unreasonably. J.A. 377, 384-85.

While the District Court gave almost no weight to the officers' "concerns about [Mrs.] Hegarty's mental and emotional condition," *see Hegarty*, 848 F. Supp. at 262 n. 4; App. to Ptn. at 37a, the defendants in their briefs in opposition strenuously argue that the forcible entry and shooting were justified at least in part by their fear about her emotional condition and alleged history of aggressive behavior. *See* Wright Br. at 6-7, 23-24; Resp. Br. at 18-20.

They argue that their knowledge of her emotional history and condition is undisputed and that the First Circuit was therefore justified in using it to buttress its conclusion that the officers were immune.

This analysis oversimplifies the concept of a disputed issue of material fact in a qualified immunity case by reducing it to a yes-or-no proposition: either the officers had knowledge of Mrs. Hegarty's emotional sate or they did not; either she had had previous problems or she had not.

This problem arises because the issues of Mrs. Hegarty's mental state and the officers' knowledge of it are not capable of numerical or other exactitude. The question in this case is not simply *whether or not* Kathy Hegarty was emotionally unstable on the night of her death, but rather, if she was, how unstable she was, how much the officers knew about her condition, whether what they thought they knew was accurate, and how that information would be factored into a reasonable officer's analysis of probable cause and exigent circumstances.

The inquiry in a qualified immunity case is whether a reasonable officer with the same information as defendants would do what the officers did. *See, e.g., Anderson v. Creighton*, 483 U.S. 635, 641, 107 S. Ct. 3034, 3040, 97 L. Ed. 2d 523 (1987). That analysis cannot be made based on the simple question whether Mrs. Hegarty was emotionally overwrought or psychologically unstable on that night.

Where knowledge of different mental states would lead a reasonable officer to do different things, if there is evidence in the record that Mrs. Hegarty could have been more or less upset or unstable, her mental condition is a material and

disputed issue of fact which cannot be resolved on summary judgment, even if, as defendants maintain, there is a range of acceptable and therefore immune conduct. If a jury could find, for example, as it could here, that Mrs. Hegarty was simply upset that night because of the trespassing campers,[1] it is unlikely that an objectively reasonable officer would be justified in forcibly entering her cabin and shooting her to death only minutes after getting there with so little effort to get her to come out peacefully.

This precise distinction was recognized by the First Circuit in *Prokey v. Watkins*, 942 F.2d 67, 75 (1st Cir. 1991):

> Whether, here, a reasonable policeman, on the basis of the information known to him, could have believed there was probable cause is a question of law, subject to resolution by the judge not the jury. *See Hall v. Ochs*, 817 F.2d 920, 924 (1st Cir.1987). Nevertheless, *if what the policeman knew prior to the arrest is genuinely in dispute, and if a reasonable officer's perception of probable cause would differ depending on the correct version, that factual dispute must be resolved by a fact finder. See Vacca v. Barletta*, 933 F.2d 31, 34-35 (1st Cir. 1991); *Rakovich v. Wade*, 850 F.2d 1180, 1202 (7th Cir.), *cert. denied*, 488

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[1]Contrary to defendants' assertion, there is evidence in the record to support a finding that the campers had trespassed on the Hegartys' property in order to get to their campsite (which itself may have been on the Hegartys' land). *See* J.A. 884-85. Moreover, defendants concede that Mrs. Hegarty was upset in part because she thought the campers were trespassing. *See* Resp. Br. at 2.

U.S.968, 109 S. Ct. 497, 102 L. Ed. 2d 534 (1988).

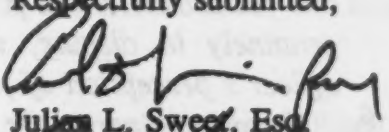
[Emphasis added].

Under this analysis, even if it is accepted *arguendo* that Mrs. Hegarty had prior psychological problems or a history of aggressive behavior about which some or all of the defendants knew, the nature and extent of her mental state and the officers' knowledge of that state are disputed questions of fact.

CONCLUSION

For the reasons set out herein and in the Petition for Certiorari, this Court should grant the Petition and should remand this case to the First Circuit Court of Appeals for reconsideration in light of *Johnson v. Jones*, ___ U.S. ___, 115 S. Ct. 2151, 132 L. Ed. 2d 238 (1995).

Respectfully submitted,



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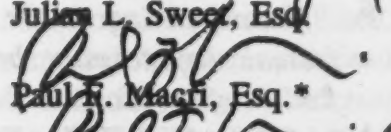

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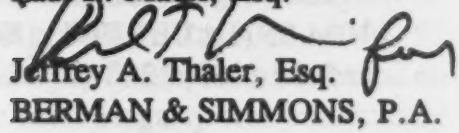

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